



Defending Israel at the ICC: The Situation in Palestine, Pt. II

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DEFENDING ISRAEL AT THE ICC: “THE SITUATION IN PALESTINE”

Part 2

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5. *AMICUS BRIEF*: “PUBLIC WITH PUBLIC ANNEXES A B AND C: CORRIGENDUM TO SUBMISSIONS PURSUANT TO RULE 103 (THE ISRAEL FOREVER FOUNDATION)”

1. INTRODUCTION:

This seminar is brought to you by the National Jewish Advocacy Center, a nonprofit organization committed to advocating for the Jewish nation and the Jewish state as prisms through which people from all walks of life can learn about the dignity of difference, the power of coexistence, and the strength that comes from tolerance.

In December 2019, Ms. Fatou Bensouda, the Chief Prosecutor of the International Criminal Court in the Hague, announced her intention to launch an investigation into alleged war crimes that she believes may have been committed by the State of Israel in the “Palestinian territories.”

In theory, if the Prosecutor were to investigate, and were to find that there were crimes committed, and were to find that Israel courts were insufficient for dealing with the issue, she could potentially drag Israeli soldiers and other officials into the dock at the ICC. While this remains unlikely, the international legal community must be vigilant to make sure that unlawful and unjust investigations are stopped as soon as possible.

In truth, many of the allegations recited were already investigated by Israel, and were factually untrue. In addition, if Israeli soldiers do commit crimes, the Israeli court system is fully capable of handling them and has demonstratively done so in the past. But more fundamentally, this investigation should never be allowed to go forward because rules and regulations matter in a court of law, and such an investigation would be in flagrant disregard of the ICC’s own rules and regulations. Among the many substantive issues plaguing the Prosecutor’s case, for example, are the facts that Israel is not a party to the Rome Statute, and under international law (and by the Palestinian Authority’s own numerous public admissions) there is no State of Palestine. The Court therefore, has no jurisdiction in this matter.

To her credit, the Prosecutor is fully aware that she is on very shaky legal ground, and so rather than wasting a lot of time investigating only to be told in a few years that she had no jurisdiction to be doing this, she asked the Court to give a preliminary ruling on jurisdiction, and for relevant interested parties to submit their observations on the case. There were nineteen groups that submitted filings in the interest of the State of Israel, and the following materials summarize the main findings of those observations.

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2. MASTER LIST OF PRIMARY ARGUMENTS:

- I.** Under Article 12(2)(a) of the Rome Statute, the term “State” was intended to mean a sovereign State pursuant to general international law.
- II.** Palestine is not a “State” for the purposes of Article 12(2)(a) of the ICC Statute merely because of its accession to the Rome Statute or its membership of the Assembly of State Parties.
- III.** The role of the UN Secretary General as treaty depository is of a purely administrative nature and is not invested with competence to make a final determination on issues of substance. The status of “non-member observer state” at the UNGA is also not determinative of whether the relevant entity has met the Montevideo criteria thus giving it the legal status of a State under international law.
- IV.** A right of self-determination under international law does not, in and of itself, convey on a population the legal status of sovereign Statehood.
- V.** Palestine cannot delegate jurisdiction to the International Criminal Court which it (Palestine) has never acquired itself. Specifically, Palestine does not have criminal jurisdiction over Israeli citizens, nor do they have the necessary territorial jurisdiction.
- VI.** It would not be appropriate for the ICC to determine whether Palestine is a sovereign State as a matter of general international law or whether the conduct in question occurred “on the territory of” Palestine when there are mandated legal frameworks for negotiated solutions. Whether Palestine is to be considered a “State” is a “final status issue” that is reserved for bilateral peace negotiations between Palestine and Israel.
- VII.** Palestine itself has not made a clear and unequivocal territorial assertion, and even if it did, the land is disputed territory.
- VIII.** The PA had no jurisdiction whatsoever prior to the Oslo Accords. The Oslo accords, by providing a framework for future peace negotiations, necessarily implied that Palestine is not a state before the Oslo Accords, and its status of statehood depended on future negotiations.
- IX.** Adjudicating statehood in this case will have a detrimental effect on the stability of other states that would see secessionist movements be granted legal legitimacy despite not otherwise meeting the criteria for statehood.
- X.** The Prosecutor’s argument is that the normative criteria of statehood under international law may be ignored in the “unique” situation of Palestine. This is a highly controversial argument of exception for which there is no legal authority.

PALESTINE, *UTI POSSIDETIS JURIS*, AND THE BORDERS OF ISRAEL

Abraham Bell* & Eugene Kontorovich**

Israel's borders and territorial scope are a source of seemingly endless debate. Remarkably, despite the intensity of the debates, little attention has been paid to the relevance of the doctrine of uti possidetis juris to resolving legal aspects of the border dispute. Uti possidetis juris is widely acknowledged as the doctrine of customary international law that is central to determining territorial sovereignty in the era of decolonization. The doctrine provides that emerging states presumptively inherit their pre-independence administrative boundaries.

Applied to the case of Israel, uti possidetis juris would dictate that Israel inherit the boundaries of the Mandate of Palestine as they existed in May, 1948. The doctrine would thus support Israeli claims to any or all of the currently hotly disputed areas of Jerusalem (including East Jerusalem), the West Bank, and even potentially the Gaza Strip (though not the Golan Heights).

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INTRODUCTION

Israel’s borders and territorial scope are a source of heated and longstanding debate.¹ The fiercest arguments concern Jerusalem—many states deny Israeli claims to sovereignty in “East Jerusalem” (areas occupied by Jordan from 1948–1967 and incorporated thereafter by Israel into the Jerusalem municipality), while others, such as the United States, deny Israeli claims to sovereignty in any part of Jerusalem, East or “West.”² But the debates go well

1. See, e.g., HENRY CATTAN, *PALESTINE AND INTERNATIONAL LAW: LEGAL ASPECTS OF THE ARAB-ISRAELI CONFLICT* 122–30 (1973); HOWARD GRIEF, *THE LEGAL FOUNDATION AND BORDERS OF ISRAEL UNDER INTERNATIONAL LAW* (2008); ELIHU LAUTERPACHT, *JERUSALEM AND THE HOLY PLACES* 5 (1968); Yehuda Z. Blum, *The Missing Reversioner Reflections on the Status of Judea and Samaria*, 3 *ISR. L. REV.* 279 (1968); Alan Levine, Note, *The Status of Sovereignty in East Jerusalem and the West Bank*, 5 *N.Y.U. J. INT’L L. & POL.* 485, 485–502 (1972); Stephen M. Schwebel, Comment, *What Weight to Conquest?*, 64 *AM. J. INT’L L.* 344, 344–47 (1970).

2. See, e.g., John Quigley, *Jerusalem: The Illegality of Israel’s Encroachment*, 9 *PALESTINE Y.B. INT’L L.* 19 (1996/97); Larry Kletter, Note, *The Sovereignty of Jerusalem in International Law*, 20 *COLUM. J. TRANSNAT’L L.* 319 (1981). For more on the United States’ view on Jerusalem, see *Zivotofsky ex. rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076 (2015).

beyond Jerusalem. The location of Israel's eastern frontier is the heart of debates about the status of Israel's presence in the West Bank.³

Remarkably, despite the intensity of the debates, little attention has been paid to the relevance of the doctrine of *uti possidetis juris*⁴ to resolving legal aspects of the border dispute. *Uti possidetis juris* is widely acknowledged as the doctrine of customary international law that has proven central to determining territorial sovereignty in the era of decolonization.⁵ The doctrine provides a clear guideline for the borders of newly created states formed out of territories that previously lacked independence or sovereignty.

Today, it is generally accepted that the borders of newly formed states are determined by application of *uti possidetis juris* as a matter of customary international law. The doctrine even applies when it conflicts with the principle of self-determination.⁶ Summarizing the operation of the rule, Steven Ratner explains, "Stated simply, [the doctrine of] *uti possidetis [juris]* provides that states emerging from decolonization shall presumptively inherit the colonial administrative borders that they held at the time of independence."⁷ Recent decades have shown that *uti possidetis juris* applies to all cases where the borders of new states have to be determined, and not just in its original context of decolonization.⁸ Thus, for instance, *uti possidetis juris* was used to determine the borders of the states created by the dissolution of the Soviet Union,⁹ Czechoslovakia,¹⁰ and Yugoslavia.¹¹

3. See, e.g., DAVID MAKOVSKY, WASHINGTON INSTITUTE FOR NEAR EAST POLICY, IMAGINING THE BORDER: OPTIONS FOR RESOLVING THE ISRAELI-PALESTINIAN TERRITORIAL ISSUE 1–7 (2011); Toby Harnden & Adrian Blomfeld, *Benjamin Netanyahu Rebukes Obama Over 1967 Plan*, THE TELEGRAPH (May 20, 2011, 7:52 PM), <http://www.telegraph.co.uk/news/worldnews/middleeast/israel/8527226/Benjamin-Netanyahu-rebukes-Barack-Obama-over-1967-plan.html>; Frank Jacobs, *The Elephant in the Map Room*, N.Y. TIMES: OPINIONATOR (Aug. 7, 2012, 12:43 PM), http://opinionator.blogs.nytimes.com/2012/08/07/the-elephant-in-the-map-room/?_r=0.

4. Sometimes written as "*uti possidetis iuris*."

5. See Malcolm N. Shaw, *The Heritage of States: The Principle of Uti Possidetis Today*, 67 BRIT. Y.B. INT'L L. 75, 115 (1996).

6. *Id.* at 123–25.

7. Steven R. Ratner, *Drawing a Better Line: Uti Possidetis and the Borders of New States*, 90 AM. J. INT'L L. 590, 590 (1996).

8. Anne Peters, *The Principle of Uti Possidetis Juris: How Relevant Is It for Issues of Secession?* in SELF-DETERMINATION AND SECESSION IN INTERNATIONAL LAW 95–137 (Christian Walter et al. eds., 2014).

9. See Justin A. Evison, *MIGs and Monks in Crimea: Russia Flexes Cultural and Military Muscles, Revealing Dire Need for Balance Of Uti Possidetis and Internationally Recognized Self-Determination*, 220 MIL. L. REV. 90, 95 (2014).

10. Ratner, *supra* note 7, at 597–98.

11. See PETER RADAN, THE BREAK-UP OF YUGOSLAVIA AND INTERNATIONAL LAW 5 (2002).

Although it was once merely a regional rule, the doctrine is now applied to border disputes around the world.¹² As the International Court of Justice ruled in *The Case Concerning the Frontier Dispute (Burkina Faso/Republic of Mali)*:

[T]he principle of *uti possidetis [juris]* seems to have been first invoked and applied in Spanish America, inasmuch as this was the continent which first witnessed the phenomenon of decolonization involving the formation of a number of sovereign States on territory formerly belonging to a single metropolitan State. Nevertheless the principle is not a special rule which pertains solely to one specific system of international law. It is a general principle, which is logically connected with the phenomenon of the obtaining of independence, wherever it occurs. Its obvious purpose is to prevent the independence and stability of new States being endangered by fratricidal struggles provoked by the challenging of frontiers following the withdrawal of the administering power. . . . At first sight this principle conflicts outright with another one, the right of peoples to self-determination. In fact, however, the maintenance of the territorial status quo [] is often seen as the wisest course, to preserve what has been achieved by peoples who have struggled for their independence.¹³

The application of the principle of *uti possidetis juris* to the legal borders of Israel seems straightforward. Israel emerged as a new state in 1948, when it declared statehood at the expiration of the Mandate of Palestine.¹⁴ The new state of Israel was immediately invaded by its neighbors and several non-neighboring Arab states,¹⁵ and at the conclusion of hostilities, Israel possessed only part of the territory of the Mandate (the remaining Mandatory territory was occupied by Syria, Egypt, and Transjordan).¹⁶ Israel and its neighbors reached armistice agreements,¹⁷ but they failed to reach peace treaties or boundary agreements. For its part, the British Mandatory government—the immediately prior ruling authority until 1948—did not propose or reach any agreement on borders with the new state.¹⁸ While there had been proposals to divide the territory of Palestine between

12. See Shaw, *supra* note 5, at 104, 106–11; Temple of Preah Vihear (Cambodia v. Thai.), Judgment, 1962 I.C.J. Rep. 6, 17–27 (June 15); see also Joshua Castellino, *Territorial Integrity and the “Right” to Self-Determination: An Examination of the Conceptual Tools*, 33 BROOK. J. INT’L L. 503, 509–10 n.34 (2008).

13. *In re Frontier Dispute (Burk. Faso v. Mali)*, Judgment, 1986 I.C.J. 554, 565–67 (Dec. 22).

14. See BENNY MORRIS, 1948: A HISTORY OF THE FIRST ARAB-ISRAELI WAR 178 (2004).

15. See *id.* at 181.

16. See *id.* at 375. The possessory status of some areas was difficult to determine; these areas were considered demilitarized “no-man’s zones.”

17. See Lebanese-Israeli General Armistice Agreement, Isr.–Leb., March 23, 1949, UN Doc S/1296; Armistice Agreement Between the Hashemite Jordan Kingdom and Israel, Isr.–Jordan, Apr. 3, 1949, U.N. Doc. S/1302; Israeli-Syrian General Armistice Agreement, Isr.–Syria, July 20, 1949, U.N. Doc. S/1353; Egyptian-Israeli General Armistice Agreement, Egypt–Isr., Feb. 23, 1949, U.N. Doc. S/1264.

18. See MORRIS, *supra* note 14, at 178–79.

two new states (one Jewish and one Arab), Israel was the only state to emerge from the Mandate of Palestine.¹⁹

Israel's independence would thus appear to fall squarely within the bounds of circumstances that trigger the rule of *uti possidetis juris*. Applying the rule would appear to dictate that Israel's borders are those of the Palestine Mandate that preceded it, except where otherwise agreed upon by Israel and its relevant neighbor. And, indeed, rather than undermine the application of *uti possidetis juris*, Israel's peace treaties with neighboring states to date—with Egypt²⁰ and Jordan²¹—appear to reinforce it. These treaties ratify borders between Israel and its neighbors explicitly based on the boundaries of the British Mandate of Palestine.²² Likewise, in demarcating the so-called “Blue Line” between Israel and Lebanon in 2000, the United Nations Secretary General relied upon the boundaries of the British Mandate of Palestine.²³

Given the location of the borders of the Mandate of Palestine, applying the doctrine of *uti possidetis juris* to Israel would mean that Israel has territorial sovereignty over all the disputed areas of Jerusalem, the West Bank, and Gaza, except to the degree that Israel has voluntarily yielded sovereignty since its independence.²⁴ This conclusion stands in opposition to the widely espoused position that international law gives Israel little or no sovereign claim to these areas.²⁵ Amazingly, however, such pronouncements reveal no awareness²⁶ of the

19. *Id.*

20. Treaty of Peace, Egypt–Isr. art. II, Mar. 26, 1979, 18 I.L.M. 362 (1979) (“The permanent boundary between Egypt and Israel is the recognized international boundary between Egypt and the former mandated territory of Palestine . . .”).

21. Treaty of Peace, Isr.–Jordan, Oct. 26, 1994, 34 I.L.M. 43 (1995) (“The international boundary between Israel and Jordan is delimited with reference to the boundary definition under the Mandate . . .”).

22. As we discuss in Part III, while explicitly based on the Mandatory boundaries, the peace-treaty boundaries in some cases differed from earlier frontiers, and the treaties also recorded some areas of unresolved disagreement between the parties.

23. See U.N. Secretary-General, *Report of the Secretary-General on the Implementation of Security Council Resolutions 425 (1978) and 426 (1978)*, ¶ 6 n.1, U.N. Doc. S/2000/590 (June 16, 2000) (“As noted in my report of 22 May, the international boundary between Israel and Lebanon was established pursuant to the 1923 Agreement between France and Great Britain entitled ‘Boundary Line between Syria and Palestine from the Mediterranean to El Hamme’, which was reaffirmed in the ‘Israeli-Lebanese General Armistice Agreement’ signed on 23 March 1949.”).

24. See *supra* note 22.

25. See, e.g., Barack Obama, President, U.S., Remarks by the President on the Middle East and North Africa (May 11, 2011), <https://www.whitehouse.gov/the-press-office/2011/05/19/remarks-president-middle-east-and-north-africa>; David Cameron, Prime Minister, U.K., Mahmoud Abbas, President, Palestine, David Cameron and Mahmoud Abbas Press Conference (Mar. 13, 2014), <https://www.gov.uk/government/speeches/press-conference-in-jerusalem>.

26. Some writing in support of Palestinian territorial claims obliquely concedes the relevance of the doctrine while refusing to apply it to Israel. Jean Salmon, for instance, in discussing whether a state of Palestine was created by declaration in 1988, writes that the borders of Mandatory Palestine have been transferred to the compound entity of Israel and a

application of *uti possidetis juris* to the borders between Israel and its neighboring states.²⁷ Indeed, the literature on both the doctrine and the Israeli-Arab conflict has almost entirely ignored application of *uti possidetis* to Mandatory Palestine.²⁸

At its expiration in 1948, the borders of the Mandate of Palestine, both internal and external, were relatively well demarcated and uncontroversial. Thus

future Arab Palestine by operation of *uti possidetis juris*. At the same time, Salmon implicitly denies the benefit of the doctrine to any Israeli claims, while offering no precedent or argument for the application of *uti possidetis juris* to a compound comprised of a state created several decades earlier and a proposed new state yet to be created. Jean Salmon, *Declaration of the State of Palestine*, 5 PALESTINE Y.B. INT'L L. 48, 53 (1989). For his part, Gino Naldi notes that *uti possidetis juris* transforms "former boundaries [into] international frontiers protected by international law" before improbably concluding that, "[c]onsequently, a Palestinian state would correspond to all the Palestinian territories Israel has occupied since 1967, including East Jerusalem." Gino J. Naldi, *The Peaceful Settlement of Disputes in Africa and its Relevance to the Palestinian/Israeli Peace Process*, 10 PALESTINE Y.B. INT'L L. 27, 40 (1998–1999). Naldi makes no reference to the borders of the Mandate and provides no explanation for rejecting the conclusion that the former boundaries of the Mandate would be Israel's international frontiers protected by international law. *Id.* Iain Scobbie acknowledges that the doctrine of *uti possidetis juris* would require transferring the borders of the Palestine Mandate to the independent state that emerged, but then strangely ignores that the independent state that emerged was Israel, and instead argues that a future state of Palestine would inherit the borders of the Mandate. Iain Scobbie & Sarah Hibbin, Research Paper, *The Israel-Palestine Conflict in International Law: Territorial Issues* (SOAS Sch. L., Research Paper No. 02/2010, 2009), <http://ssrn.com/abstract=1621382>; see also, Daniel Benoliel, *Israel and the Palestinian State: Reply to Quigley*, 1 U. BALT. J. INT'L L. 1, 19–20 (2012) (noting that an independent Palestinian state would have the borders of those areas under Palestinian Authority jurisdiction under the Oslo Accords). As we discuss in the Conclusion, the doctrine of *uti possidetis juris* may very well be relevant to potential Palestinian border discussions in the future, but such discussions are premature until the establishment of Palestine's independence as a state.

27. Another small amount of literature concerns the related, but rejected, legal principle of *uti possidetis facto*. See *infra* Part I (defining *uti possidetis facto*); Allan Gerson, *Trustee-Occupant: The Legal Status of Israel's Presence in the West Bank*, 14 HARV. INT'L L.J. 1, 6 n.15 (1973) (noting that "[t]he doctrine of *uti possidetis [facto]* according to which the governing factor is the respective positions achieved by the belligerents at the termination of a war is generally not accepted in international law"); Sanford R. Silverburg, *Uti Possidetis and a Pax Palistiniana: A Proposal*, 16 DUQ. L. REV. 757, 759 (1977–1978) (defining *uti possidetis [facto]* as sanctifying the territorial "*status quo post bellum*"—i.e., as granting sovereignty on the basis of actual post-war possession rather than pre-independence boundaries—and arguing for its application to the borders of Israel). In a spectacular non sequitur, John Quigley cites Silverburg disapprovingly in arguing that "the international community has not followed . . . [the doctrine of] *uti possidetis [facto]*, which says that one owns what one possesses" and that *uti possidetis* cannot therefore be "posited to justify Israel's existence." JOHN B. QUIGLEY, *THE CASE FOR PALESTINE: AN INTERNATIONAL LAW PERSPECTIVE* 91–92 (2005).

28. Without addressing directly the effect of *uti possidetis juris*, Malcolm Shaw notes that the proposed partition of the Palestine Mandate in 1947 was an attempt to utilize the powers of the General Assembly towards the Mandate to mitigate the demands of *uti possidetis juris* in the interest of peace. See Shaw, *supra* note 5, at 148.

uti possidetis juris could be a powerful tool for resolving extant disputes about the borders of Israel. To be sure, Israel appears to be interested in drawing consensual new boundaries that differ from the borders established by *uti possidetis juris*.²⁹ *Uti possidetis juris* does not preclude later modifications of borders. Application of *uti possidetis juris*, as is customary in other boundary disputes, would nevertheless provide a clear baseline for future negotiated solutions.³⁰

In this Article, we attempt to fill this notable gap in the scholarly literature. The Article explores the history and development of *uti possidetis juris* to see how it has been applied to previous disputes about states emerging from Mandatory territories, which are neither “classic decolonizations” nor the breakup of composite states. Likewise, this Article looks to the history of the Palestine Mandate (and to historic disputes about the Palestine borders) to see how it conforms to the patterns of the application of *uti possidetis juris*. We find that *uti possidetis juris* has been fully applied to the numerous border disputes regarding former Mandatory territories, notwithstanding the Mandates’ odd juridical statuses as neither full-fledged states, nor colonial possessions, nor mere administrative units of the Mandatory power. We find that bitter controversies about the borders of the Palestine Mandate are far from particular to Palestine. Similar controversies emerged regarding the borders of many other Mandates because they often took little account of national self-determination interests and were in several instances illegally modified by the Mandatory. Numerous Mandates were plagued by international doubts about the wisdom of their borders and subjected to serious discussions of revision. Yet in all cases, the borders of the Mandate as they stood at independence became the borders of the new successor state.

We go on to examine the events surrounding the termination of the Palestine Mandate and declaration of independence by Israel to determine whether the application of *uti possidetis juris* was overridden by Israel’s behavior at the time of independence. We fail to find any basis in that behavior for rejecting the application of *uti possidetis juris*.

29. Since 1993, Israel has been engaged in negotiations with the Palestine Liberation Organization (“PLO”) based on some unspecified future Israeli territorial concessions to be agreed upon in “permanent status” talks. See Declaration of Principles on Interim Self-Government Arrangements (“Oslo Agreement”), PLO–Isr., art. V, Sept. 13, 1993, <http://www.refworld.org/docid/3de5e96e4.html> [accessed 2017%20December%202015]; see also The Israeli-Palestinian Interim Agreement (“Oslo II”), Isr.–Palestine, ch. 2 art. XI ¶ 2(f), ch. 3 art. XVII ¶ 1(a), <http://www.mfa.gov.il/mfa/foreignpolicy/peace/guide/pages/the%20israeli-palestinian%20interim%20agreement.aspx>. Successive Israeli governments have made several “permanent status” offers to the PLO, which would have involved the waiver of Israeli claims of sovereignty to nearly all of the West Bank and Gaza. For a summary of Israeli offers, see Rick Richman, *The Thrice Offered Palestinian State*, COMMENT. MAGAZINE ¶ 1 (May 17, 2011), <https://www.commentarymagazine.com/foreign-policy/middle-east/thrice-offered-palestinian-state/>.

30. The territorial baseline for negotiations has proved an extremely contentious issue in the past.

In Part I, we explain the doctrine of *uti possidetis juris* generally and show how it has been used in other post-colonial territorial disputes. In Part II, we turn to the way *uti possidetis juris* has been used to determine the boundaries of states that emerged from Mandatory territories. In Part III, we explore the history of the emergence of the state of Israel from the British Mandate of Palestine, with particular attention to the boundaries of the Palestine Mandate. Finally, in Part IV, we examine whether there are any peculiar features of the Palestine Mandate or the independence of Israel that would preclude application of the doctrine of *uti possidetis juris*. A conclusion follows, in which we sketch out the implications of our findings.

I. THE DOCTRINE OF *UTI POSSIDETIS JURIS*

A. *Development of the Doctrine*

As the Latin name suggests, *uti possidetis juris* stems from Roman law, although the modern doctrine of international law has little to do with its Roman antecedent. The Roman *uti possidetis* concerned property, rather than territorial sovereignty. It granted a litigant with actual possession of a disputed item a presumptive right to continue in possession. It earned its name as a result of the phrase *uti possidetis, ita possideatis*, meaning “as you possess, so may you possess.”³¹

The modern international law doctrine of *uti possidetis juris* is generally thought to have originated in nineteenth-century Latin America.³² In many ways, the international law doctrine is the opposite of its Roman-law ancestor. The Roman version created only a presumptive right; the international law version vests absolute title. The Roman version concerned property rights; the international law version concerns territorial sovereignty. And most importantly, the Roman version rewarded actual possession with legal right; the international law version disregards actual possession and recognizes title on the basis of colonial administrative lines.³³

The modern doctrine of *uti possidetis juris* is best understood by looking to its historic emergence nearly two centuries ago. At the time, the various new countries of Latin America were engaged in a series of boundary disputes following the withdrawal of Spain and Portugal—the colonial powers that had previously claimed territorial sovereignty of all territory south of the United States and Canada—and the emergence of a number of entirely new states. Neither Spain nor Portugal had clearly established the borders of the new states on their withdrawal. Additionally, the newly independent territories rapidly splintered into a large number of independent countries. Seeking to avoid endless conflicts about

31. See John Bassett Moore, *Memorandum on Uti Possidetis: Costa Rica – Panama Arbitration, 1911*, in 3 THE COLLECTED PAPERS OF JOHN BASSETT MOORE 328, 330 (1944); Malcolm Shaw, *Peoples, Territorialism and Boundaries*, 8 EUR. J. INT’L L. 478, 492 (1997); Peters, *supra* note 8, at 97–98; Ratner, *supra* note 7, at 592–93.

32. Shaw, *supra* note 31, at 493.

33. Shaw, *supra* note 5, at 117; Shaw, *supra* note 31, at 492.

their borders, the new states soon adopted a rule of *uti possidetis* to establish their boundaries.³⁴

At the time, two different versions of *uti possidetis* vied for supremacy. The rule of *uti possidetis facto* (or *uti possidetis de facto* or *uti possidetis facti*) would have awarded sovereignty to the actual possessor of territory. The doctrine of *uti possidetis juris* (or *uti possidetis iuris*), by contrast, ignored the actual land holdings of the new countries, and instead focused on the administrative boundaries created by the colonial powers prior to independence.³⁵ Importantly, the administrative lines used to fix the boundaries under *uti possidetis juris* generally were not international boundaries, and the administrative units they demarcated were not the sovereign predecessors of the new countries. Rather, *uti possidetis juris* utilized administrative lines of various kinds (some purely administrative, some international) to fashion the new sovereign borders. Succession to the legal personality of the colonial entity was thus not a requirement of the application of *uti possidetis juris*.³⁶

International law writings in the seventeenth century suggested that *uti possidetis facto* was the preferred doctrine. For instance, in 1612, Alberico Gentili explained that international law held that “territories . . . remain the power of the [state] who holds them at the time when peace is made, unless it has been otherwise provided by a treaty.”³⁷ As late as 1929, T.J. Lawrence wrote that the principle of *uti possidetis* “held that the conclusion of peace legalizes the state of possession existing at the moment, unless special stipulations are contained in the treaty.”³⁸ By looking to possession as the key to the application of the doctrine, *uti possidetis facto* sanctified the *status quo post bellum*—the *de facto* borderlines created by war.³⁹

But in time, *uti possidetis juris* (and not *uti possidetis facto*) became the dominant doctrine for determining post-colonial borders.⁴⁰ After being adopted in numerous agreements establishing borders in Latin America,⁴¹ the principle was adopted in Africa in the Organization of African Unity’s Resolution on Border Disputes among African States.⁴² The International Court of Justice subsequently

34. SUZANNE N. LALONDE, DETERMINING BOUNDARIES IN A CONFLICTED WORLD: THE ROLE OF *UTI POSSIDETIS* 31 (2002).

35. *Id.*

36. *Id.* at 33.

37. See ALBERICO GENTILI, DE JURE BELLI LIBRI TRES 381 (John C. Rolfe trans., 1933) (1612).

38. T.J. LAWRENCE, PRINCIPLES OF INTERNATIONAL LAW 562 (1923).

39. LALONDE, *supra* note 34, at 18.

40. *Id.* at 23.

41. See, e.g., Boundary Treaty, Chile–Arg. July 23, 1881; Treaty Relating to the Demarcation of Frontiers, Bol.–Peru, Sept. 23, 1902; see also LALONDE, *supra* note 34, at 24–60.

42. See Org. of African Unity [OAU], *Border Disputes Among African States*, AHG/Res. 16(I), <http://www.peaceau.org/uploads/ahg-res-16-i-en.pdf>; see also LALONDE, *supra* note 34, at 103–37.

applied the doctrine of *uti possidetis juris* in several cases,⁴³ but its definitive pronouncement on the subject was in the Burkina Faso v. Mali case.⁴⁴ In that case, the court had to draw the border between Burkina Faso and Mali, both of which emerged from a single French colony called French West Africa. The court noted that the parties had requested a ruling on the basis of *uti possidetis juris*, but even if the parties had not so agreed, the court would have used the doctrine anyway.⁴⁵

The court explained that *uti possidetis juris* was a doctrine of customary international law, applicable throughout the world.⁴⁶ The court also seized the opportunity to explain the scope of *uti possidetis juris*, stating that where the colonial administrative lines, and the exercise of colonial authority within those lines, were clear, the lines would serve as the boundaries of the new state even where the new state did not actually possess the territory.⁴⁷ Therefore, a state that acquired territorial sovereignty over territory through *uti possidetis juris* would not lose sovereignty simply because another state possessed and administered part of that territory. Additionally, the doctrine of *uti possidetis juris* would take precedence in establishing borders given the paramount importance of stable borders in maintaining the peace, notwithstanding the importance of the principle of self-determination in determining governing arrangements in the post-colonial world.⁴⁸

Recent decades have demonstrated that *uti possidetis juris* applies more broadly to all new states, even when not the result of a process of decolonization. Thus, recent years have seen the application of the principle of *uti possidetis juris* to determine the borders of the new states created out of the former Yugoslavia, Czechoslovakia, and Soviet Union.⁴⁹ In the case of Yugoslavia, the universal application of *uti possidetis juris* was reaffirmed by the Robert Badinter-led Arbitration Commission. The Badinter Commission's declaration was clear and explicit: "[W]hatever the circumstances, except where the states concerned agree otherwise, the right to self-determination must not involve changes to existing frontiers existing at the time of independence (*uti possidetis juris*)."⁵⁰ Thus,

43. See, e.g., *In re Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea* (Nicar. v. Hond.), Judgment, 2007 I.C.J. 661, 706 (Oct. 8) (stating that "[i]t is beyond doubt that the *uti possidetis juris* principle is applicable to the question of territorial delimitation between Nicaragua and Honduras, both former Spanish colonial provinces" while finding no clear evidence on provincial boundaries, and therefore ruling that "the principle of *uti possidetis* affords inadequate assistance in determining sovereignty over these islands because nothing clearly indicates whether the islands were attributed to the colonial provinces of Nicaragua or of Honduras prior to or upon independence.").

44. *In re Frontier Dispute* (Burk. Faso/Mali), 1986 I.C.J. 554, 566 (Dec. 22).

45. *Id.* at 565.

46. *Id.*

47. *Id.* at 566.

48. *Id.*

49. See *supra* notes 7, 9, 11 and accompanying text; Shaw, *supra* note 5, at 106–11.

50. Conference on Yugoslavia Arbitration Commission, Opinion No. 2 (Jan. 11, 1992). The full text of the opinion is quoted in Alain Pellet, *The Opinions of the Badinter*

“except where otherwise agreed, former republican borders become international frontiers protected by international law.”⁵¹ Importantly, in all these cases, the absence of a colony preceding independence was no barrier to the application of *uti possidetis juris*. The doctrine applied as in all other cases of newly independent states, and it transformed the pre-independence administrative boundaries (in this case, between federal republics) into the boundaries of the new states.

Of course, states are free to rearrange their boundaries voluntarily, subject to the consent of neighbors or other relevant parties. The borders established by *uti possidetis juris* can be changed by treaty or by any of the other means recognized by international law, including, in exceptional cases, by acquiescence.⁵² Nonetheless, cases like Yugoslavia make clear that in the absence of an agreed-upon redrawing of the borders, *uti possidetis juris* retains its primacy in determining the borders of newly independent states.

Uti possidetis juris is not without its critics. By transforming colonial and administrative lines into national borders, the doctrine repurposes the lines to a task they were not meant to fill. The administrative and colonial lines may have been drawn for purposes that served the former sovereign, without regard to topography or local needs.⁵³

Nonetheless, there are strong reasons why *uti possidetis juris* has prevailed as a rule of customary international law. It is a strong force for stability of borders, and it serves to reduce conflict. While *uti possidetis juris* seemingly legitimizes arbitrary colonial decisions and undermines self-determination, empirical research suggests that “borders drawn along previously existing international or external administrative frontiers experience fewer future territorial disputes and have a much lower risk of militarized confrontation if a dispute emerges.”⁵⁴

The normative dispute about *uti possidetis juris* has been translated into a doctrinal dispute as well. Several scholars have argued against the conclusions of the Badinter Commissions and against the extension of *uti possidetis juris* into situations where a single state is broken apart by dissolution or secession.⁵⁵ However, there appears to be little doubt as a descriptive matter that *uti possidetis juris* applies to post-colonial and post-Mandate situations.

Arbitration Committee: *A Second Breath for the Self-Determination of Peoples*, 3 EUR. J. INT’L L. 178, 182–85 (1992).

51. Pellet, *supra* note 50, at 185.

52. Shaw, *supra* note 5, at 141–47.

53. See Enver Hasani, *Uti Possidetis Juris: From Rome to Kosovo*, 27 FLETCHER F. WORLD AFF. (ISSUE 2) 85, 90 (2003); LALONDE, *supra* note 34, at 31.

54. See David B. Carter & H.E. Goemans, *The Making of the Territorial Order: New Borders and the Emergence of Interstate Conflict*, 65 INT’L ORG. 275, 275 (2011).

55. Ratner, *supra* note 7, at 590; LALONDE, *supra* note 34, at 174.

B. Applying the Doctrine

Using the doctrine of *uti possidetis juris* to resolve borders is relatively straightforward. As the International Court of Justice explained in the Burkina Faso case, the doctrine ensures that:

By becoming independent, [the] new State acquires sovereignty with the territorial base and boundaries left to it by the [administrative boundaries of the] colonial power. . . . [The principle of *uti possidetis juris*] applies to the State as it is [at that moment of independence], i.e., to the “photograph” of the territorial situation then existing. The principle of *uti possidetis [juris]* freezes the territorial title; it stops the clock . . .⁵⁶

As the International Court of Justice observed in the case of *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)*, *uti possidetis juris* is a “retrospective principle, investing as international boundaries administrative limits intended originally for quite other purposes.”⁵⁷ In applying the doctrine, one does not ask whether the law at the time of the “photograph” viewed the administrative lines as international boundaries. Indeed, it is quite plain that the borderlines are not expected to have been international boundaries at the time of the “photograph.” Thus, for instance, in the Burkina Faso case, the court did not have to inquire whether *uti possidetis juris* was a binding rule of international law at the time of decolonization. It was enough for the court that *uti possidetis juris* was a binding rule of international law at the time the court resolved the border dispute.

Uti possidetis juris thus constitutes an exception to what is known in international law as the intertemporal rule. Under the intertemporal rule, one judge judges the legal importance of acts affecting territorial sovereignty according to the law that prevailed at the time of the act. For instance, one of the determinations includes whether State A successfully acquired sovereignty over conquered territory of State B according to the legal treatment of conquest at the time of the capture, rather than under modern law, which looks skeptically at conquest.⁵⁸ By contrast, *uti possidetis juris* consciously and willingly reinterprets the legal significance of past acts. *Uti possidetis juris* transforms into international boundaries lines that in the past (just before the time of the “photograph”) were not international boundaries.

The trick, of course, is determining the moment and the subject of the “photograph.”

56. *In re Frontier Dispute (Burk. Faso/Mali)*, Judgment, 1986 I.C.J. 554, 568, ¶ 30 (Dec. 22).

57. *In re Land, Island and Maritime Frontier Dispute (El Sal./Hond., Nicar. intervening)*, Judgment, 1992 I.C.J. 351, 388 (Sept. 11).

58. Malcolm Shaw, *Introduction: The International Law of Territory: An Overview*, in *TITLE TO TERRITORY* xi, xviii (Malcolm Shaw ed., 2005).

In *uti possidetis juris*, as in other doctrines of international law affecting border disputes, the outcome is strongly affected by “critical dates,” defined by Malcolm Shaw as those “moment[s] at which the rights of the parties crystallize so that the acts after that date cannot alter the legal position.”⁵⁹ As Shaw notes, in situations not involving *uti possidetis juris*, the identity of critical dates can be a matter of some contention. If parties have embodied an explicit understanding in a treaty, the treaty’s date of effectiveness constitutes an obvious “critical date,” but in many other situations, the identity of the critical date is unclear. *Uti possidetis juris* has no such ambiguity. As Shaw writes, it is “obvious that the moment of independence is the ‘critical date.’”⁶⁰

Generally, the date of independence is easy to identify. For instance, in the case of the border dispute between Eritrea and Ethiopia, the date of independence was plainly April 27, 1993—the date upon which Eritrea joined the United Nations, following the results of an independence referendum.⁶¹ The independence referendum was the last of all the necessary steps for Eritrean independence. This is because Eritrea had already won functional possession of all of its territory in a long civil war, had maintained an independent government since 1991, and had secured Ethiopia’s agreement to abide by the results of the referendum.⁶²

Controversially, however, some have suggested earlier dates for independence. The Badinter Commission posited that the boundaries of the states that emerged out of the Federal Republic of Yugoslavia had their borders set by *uti possidetis juris* from the time when Yugoslavia dissolved, even though the component states had not yet fully established their independence.⁶³ Shaw suggests a potential date that may better mark “independence” for purposes of *uti possidetis juris*: the date of the last exercise of administrative jurisdiction by the former sovereign.⁶⁴ This alternative date appears to have been the one used by the Badinter Commission. Additionally, Shaw notes, there may be instances where several states achieve independence at roughly the same time; in such a case, the establishment of the border of one of the states may be the relevant date for establishing the border of another state.⁶⁵ Consider, for instance, the case of Czechoslovakia, which split into the states of Slovakia and the Czech Republic. If, hypothetically, the Czech Republic had achieved independence six months before Slovakia, then the critical date of the Slovak-Czech border would be the date of Czech independence, rather than the date of Slovak independence.

59. *Id.* at xxii.

60. *Id.*

61. *Id.*

62. See Decision Regarding Delimitation of the Border between the State of Eritrea and the Federal Democratic Republic of Ethiopia, Eritrea–Ethiopia Boundary Commission, 12 ¶ 2.11 (Apr. 13, 2002).

63. Pellett, *supra* note 50, at 185.

64. Shaw, *supra* note 58, at xxii.

65. *Id.*

The subject of the “photograph” is far easier to identify. Where a single state emerges from a given territory, the application of *uti possidetis juris* is easy. As the International Court of Justice noted, one of the main purposes of using *uti possidetis juris* is to avoid a situation in which there is terra nullius, i.e., territory without a sovereign.⁶⁶ That means that *uti possidetis juris* requires that the entire territory become the sovereign territory of the newly independent state. A more difficult question is posed when several states become independent at the same time from a single territory, or when a state becomes independent in a part of territory without the rest becoming terra nullius (such as when the new state secedes from an existing colony, while the colonial power continues to retain sovereignty over the remaining territory). In such a case the application of *uti possidetis juris* can be more difficult. It is important to note that, as the International Court of Justice emphasized in the Benin/Niger case, for purposes of *uti possidetis juris*, what matters in a given territory is the governmental unit that exercised actual administrative control prior to independence.⁶⁷

II. *UTI POSSIDETIS JURIS* AND MANDATORY BORDERS

Applying the doctrine of *uti possidetis juris* to new states created from League of Nations Mandate territories requires understanding the nature of Mandates. Mandates were a short-lived form of foreign rule of territory invented in the wake of World War I. They were created in order to dispose of the colonial and imperial possessions of the defeated German and Ottoman Empires.

The Mandate system implemented what was then a new principle in international affairs—the self-determination of peoples.⁶⁸ At the same time, the European powers were not yet completely ready to surrender their traditional domination of international affairs,⁶⁹ or the perceived benefits that accompanied colonialism. The resulting compromise was a new form of quasi-colonial rule, defined by Article 22 of the Covenant of the new League of Nations. Borrowing from the domestic laws of trust and of guardianship, the Covenant described Mandates as a “sacred trust of civilization,” and it committed the right to control the territories to the Mandatory powers (Britain and France, in most cases), subject to the supervision of the League of Nations. The Covenant did not describe the locus of sovereignty during the Mandatory period, and it did not fully describe the relationship between the new legal form and older and more familiar ones, leading to some confusion among legal scholars.⁷⁰

66. *In re Land, Island and Maritime Frontier Dispute* (El Sal./Hond., Nicar. intervening), Judgment, 1992 I.C.J. 351, 386–87 (Sept. 11).

67. *In re Frontier Dispute* (Benin/Niger), Judgment, 2005 I.C.J. 90 (July 12).

68. See CAMPBELL L. UPTHEGROVE, *EMPIRE BY MANDATE: A HISTORY OF THE RELATIONS OF GREAT BRITAIN WITH THE PERMANENT MANDATES COMMISSION OF THE LEAGUE OF NATIONS* 12 (1954).

69. See LASSA OPPENHEIM, *INTERNATIONAL LAW: A TREATISE* 36–37 (3d ed. 1920–21).

70. See QUINCY WRIGHT, *MANDATES UNDER THE LEAGUE OF NATIONS* 70 (1930).

Fourteen non-self-governing territories were placed under the Mandatory system: three from the Ottoman Empire, and the others from Germany. The Mandates that emerged from the Ottoman Empire were Syria and the Lebanon, Mesopotamia, and Palestine. The Mandates that emerged from Germany were British Cameroons, British Togoland, French Cameroons, French Togoland, Nauru, Ruanda-Urundi, South Pacific Mandate, South-West Africa, Tanganyika, the Territory of New Guinea, and Western Samoa.⁷¹ All of the territories were governed by a trustee state (called a Mandatory), subject to the supervision of the League of Nations and under a regime defined by a League of Nations charter (called a Mandate). The powers of the Mandatory differed by type of Mandate; in some cases, the Mandatory was entitled to govern the territory in a manner indistinguishable from a traditional colony, while in others, the powers of the Mandatory were more circumscribed and the territory close to a protectorate state. The Mandates were classified as A-, B-, or C-type Mandates, depending on the degree of authority of the Mandatory (greatest in the case of type C, lowest for type A).⁷²

Mandates were eventually eased out of the international system. Some of the Mandates became independent states before World War II. After World War II and the dissolution of the League of Nations, most of the remaining Mandates were transformed into United Nations trust territories, and the others were eventually dissolved. The sole controversial exception was South-West Africa, which South Africa initially attempted to annex, but which eventually became the independent state of Namibia.⁷³

In the context of Mandates, one of the perennial problems in applying *uti possidetis juris* is the history of instability of pre-independence administrative lines. In some cases, the Mandates were granted without clear borders ever having been determined. As we will see,⁷⁴ the borders of Mandatory Palestine generated intense interest during the Mandatory period. The boundaries were set only after several years, and border demarcation was followed by numerous suggestions to redraw the Mandatory borders. In addition, the Palestine Mandate was divided in two. But the Palestine Mandate was not unique in the degree or nature of controversy it generated regarding boundaries. This is not surprising, in that—as with all Mandates—the border-drawing process involved myriad geographic questions and trade-offs in great-power politics, as well as incompatible promises to various ethnic groups.⁷⁵

71. *Mandate*, ENCYCLOPÆDIA BRITANNICA ONLINE, <http://www.britannica.com/topic/mandate-League-of-Nations>. (last visited July 21, 2016).

72. For a history and explanation of Mandates in international law, see generally H. DUNCAN HALL, *MANDATES DEPENDENCIES AND TRUSTEESHIP* 44–52 (1948); UPTHEGROVE, *supra* note 68, at 17–18; WRIGHT, *supra* note 70, at 43–48.

73. See MICHAEL DENNIS CALLAHAN, *A SACRED TRUST: THE LEAGUE OF NATIONS AND AFRICA, 1929–1946*, at 42–43 (2004).

74. *Infra* Part III.

75. See UPTHEGROVE, *supra* note 68, at 70–71.

In numerous situations, Mandatory borders created controversies regarding territorial sovereignty with neighboring nations, ethnic self-determination, coherence and independence, and resource allocation. These controversies, which often involved considerable equities on both sides, resulted in proposals for cession, partition, and joinder of Mandatory territories that were entertained by the Mandatories, the League, and various commissions of inquiry during the Mandatory period. In most cases, the original Mandatory borders did not change as a result of these controversies.

Notably, even in the most heated of these disputes, the Mandatory borders as they existed at the moment of independence have been universally regarded as the final, settled borders of the successor nations. Such now-arcaic matters as the Mosul Question (1920s),⁷⁶ the Alexandretta controversy (1930s),⁷⁷ and the Ewe Question (1950s)⁷⁸ once preoccupied the League and then its successor United Nations Trusteeship Council. These matters centered on the validity of Mandatory boundaries for successor states. Yet once the Mandatory regime expired, the borders as they stood at the moment of independence have universally been taken as givens, and the prior controversies relegated to historical curiosities. This remains the case even when neighboring states or internal ethnic groups continued to dispute the Mandatory dispensation after independence.

A. *The Mandate of Mesopotamia*

The British Mandate for Mesopotamia was a “Class A” Mandate, and it was the first Mandate to receive independence. The Mandate experienced almost immediate upheaval. After the proposed award of the Mandate, and prior to its approval by the League of Nations, the British faced unrest throughout the country, and they eventually redubbed the territory the Kingdom of Iraq.⁷⁹ The Mandate generated two major border disputes that attracted international attention: one in the north, and one in the south. The northern dispute concerned sovereignty over the oil-rich Mosul region, with competing territorial claims by neighboring nations, as well as self-determination claims by the Kurds, a nonstate group.⁸⁰ The southern dispute concerned the border with the Gulf States, which focused on strategic and economic viability concerns.⁸¹ At various times, these disputes each resulted in both open hostilities and appeals to international organs. And the end result was the same—the confirmation of the borders as eventually established by the Mandatory.

76. See *infra* Section II.A.1.

77. See *infra* Section II.B.2.

78. See *infra* Section II.C.

79. THE ROUTLEDGE HANDBOOK OF THE HISTORY OF THE MIDDLE EAST MANDATES 5 (Cyrus Schayegh & Andrew Arsan, eds.) (2015).

80. PETER SLUGLETT, BRITAIN IN IRAQ: CONTRIVING KING AND COUNTRY 65–93 (2007); H.I. Loyd, *The Geography of the Mosul Boundary*, 68 GEOGRAPHIC J. 104, 104–05, 113 (1926).

81. See SLUGLETT, *supra* note 80, at 65–93.

1. *The Mosul Question*

Sovereignty over the Mosul Vilayet, an oil-rich area in northern Iraq, was one of the most serious controversies about Mandatory borders.⁸² The “Mosul Question” led to significant tension and occasional border skirmishes between Turkey, which claimed the area, and Britain, the Mandatory power.

The Mesopotamian Mandate was first agreed upon among the Allied Powers in the San Remo conference in Italy,⁸³ and then between the Allied Powers and Turkey (formerly the Ottoman Empire) in the ill-fated Treaty of Sèvres in 1920.⁸⁴ Turkey failed to ratify the treaty,⁸⁵ and it would take until 1923 for the Allied Powers and Turkey to agree on a replacement peace treaty—the Treaty of Lausanne.⁸⁶ In the meantime, the British moved forward to create the governing structure of a Mandate without Turkish agreement. In 1920, the British unilaterally began implementing the draft Mandate for “Mesopotamia including Mosul”⁸⁷ it had submitted to the League of Nations for approval. The Anglo-Iraqi Treaty of Alliance of 1922,⁸⁸ reached two years later, ratified most of the draft terms of the Mandate, and in 1924, the League finally retroactively approved the Mandate, and the Anglo-Iraqi Treaty as an implementation thereof.⁸⁹

The question of the Iraqi-Turkish frontier was reopened during negotiations in Lausanne in November 1922.⁹⁰ The British agreed that a peace treaty with Turkey would need to determine the “southern frontier of the Turkish

82. See generally Nevin Coşar & Sevtap Demirci, *The Mosul Question and the Turkish Republic: Before and after the Frontier Treaty, 1926*, 42 MIDDLE EASTERN STUD. 123, 126–27 (2006); Quincy Wright, *The Mosul Dispute*, 20 AM. J. INT’L L. 453, 453–64 (1926).

83. San Remo Resolution, Fr.-Ger. Gr. Brit.-It.-Japan, § (b), Apr. 25, 1920, <http://www.cfr.org/israel/san-remo-resolution/p15248>.

84. Treaty of Peace Between the British Empire and Allied Powers, Croat-Fr.-Greece-Ger.-Gr. Brit.-It.-Japan-Rom.-Serb-Slovene State-Turk., Aug. 10, 1920, 113 Brit. & Foreign St. Papers 652 [hereinafter Treaty of Sèvres].

85. HANS-LUKAS KIESER, TURKEY BEYOND NATIONALISM: TOWARDS POST-NATIONALIST IDENTITIES 58 (2006).

86. Treaty of Peace, Fr.-Greece-Gr. Brit.-It.-Japan-Rom.-Serb-Croat-Slovene State-Turk., July 24, 1923, 28 L.N.T.S. 11 [hereinafter Treaty of Lausanne].

87. Draft Mandates for Mesopotamia and Palestine: As Submitted for the Approval of the League of Nations, Dec. 1, 1920, http://www.archive.org/stream/draftmandatesfor00leagrich/draftmandatesfor00leagrich_djvu.txt.

88. Treaty of Alliance Between Great Britain and Irak, Gr. Brit.-Irak, Oct. 10, 1922, 35 L.N.T.S. 13, <http://www.galeuk.com/iraq/pdfs/Treaty%20of%20alliance%20btw%20GB%20&%20Iraq%2010%20Oct%201922%20CO%20730%20167%201.pdf>.

89. See *Request of the Kingdom of Iraq for Admission to the League of Nations: Memorandum from the Iraqi Government*, League of Nations Doc. A.171932.VII, §1 ¶ 2 (1932), http://www.ringnebul.com/Oil/Iraq_1932_LeagueofNations.htm.

90. For a history of the convoluted diplomatic chain of events, see generally DAVID FROMKIN, A PEACE TO END ALL PEACE: CREATING THE MODERN MIDDLE EAST, 1914–1922, at 559–60 (1989).

dominions in Asia.”⁹¹ Nonetheless, negotiations went poorly, with Turkey firmly insisting on its title to the region. In the 1923 Treaty of Lausanne, the parties agreed to negotiate the frontier for another year and then to submit the matter to the League Council.⁹² The Council, for its part, appointed an investigative commission to examine the matter.⁹³ After obtaining an opinion from the Permanent International Court of Justice to confirm the Council’s power to make a “definitive determination of the frontier,”⁹⁴ the Council accepted the commission’s report, which fixed the border at the status quo line of control, thus giving Mosul to the Mandate of Iraq (as Mesopotamia was then called).⁹⁵

The region was predominantly Kurdish, and the wishes of the local population were nominally considered by the commission of inquiry, though only through loose consultations with representatives of various ethnic groups.⁹⁶ These discussions were weighted by the presumed population share of that ethnic group, with the assumption that all ethnic groups had homogenous preferences. (Turkish suggestions to hold a plebiscite were repeatedly rejected.)⁹⁷ The only options posed to the Kurds were Turkish sovereignty or a British-administered Mandate. A separate Kurdish state was not considered, though the British had entertained the possibility of one in the years immediately after the war.⁹⁸

After Iraqi independence in 1932, the border decisions of the League were treated as conclusively settling both Turkish claims to territorial sovereignty as well as any potential Kurdish claims to territory for the exercise of self-determination. Despite the extreme discord over Mosul—which included sporadic British hostilities with both Kurds and Turks during the period when the frontiers were being negotiated—the League’s determination is considered to have conclusively settled the matter. The Mandatory borders have become the modern borders of Iraq and Turkey, to the disappointment of the area’s Kurdish majority.

91. Article 3, Paragraph 2, of the Treaty of Lausanne, Advisory Opinion, 1925 I.C.J. (ser. B) No. 12, at 10 (Nov. 21).

92. *Id.* at 13.

93. See FROMKIN, *supra* note 90.

94. Article 3, Paragraph 2, of the Treaty of Lausanne, *supra* note 91, at 33.

95. Question of the Frontier Between Turkey and Iraq: Report Submitted to the Council of the League of Nations by the Commission Instituted by the Council Resolution, League of Nations, September 30th, 1924; see also Wright, *supra* note 82, at 453.

96. Fuat Dunbar, “STATISQUO”: BRITISH USE OF STATISTICS IN THE IRAQI KURDISH QUESTION (1919–1932) 23 (2012), <http://www.brandeis.edu/crown/publications/cp/CP7.pdf>.

97. 1 ANTHONY D’AMATO, INTERNATIONAL LAW AND POLITICAL REALITY COLLECTED PAPERS 346 (1995).

98. See ZEYNEP ARIKANL, BRITISH LEGACY AND EVOLUTION OF KURDISH NATIONALISM IN IRAQ (1918–1926): WHAT SIGNIFICANCE THE ‘MOSUL QUESTION’? 9–17 (Centro Argentino de Estudios Internacionales, Working Paper No. 16), http://www.caei.com.ar/sites/default/files/16_1.pdf. The Treaty of Sèvres provided that in the event Turkey created an independent state of Kurdistan and renounced sovereignty, “no objection will be raised by the Principal Allied Powers to the voluntary adhesion to such an independent Kurdish State of the Kurds inhabiting that part of Kurdistan which has hitherto been included in the Mosul Vilayet.” Treaty of Sèvres, *supra* note 84, at art. 64.

Today, significant ongoing Kurdish demands for independence in Iraq (and Syria)—sounding in self-determination—have failed to overcome the *uti possidetis juris* presumption of the Mandatory borders.⁹⁹ Indeed, numerous autonomous governments in the area that have subsequently arisen, such as the present-day Kurdish Regional Government, have failed to win recognition as states because of the legal inertial force of the Mandatory border.

2. Iraqi-Kuwaiti Border

Upon the establishment of the Iraqi Mandate in May 1920, the southern border of the Mandate was no more defined than the northern border. Indeed, all of Iraq's borders were undefined,¹⁰⁰ including the boundary between southern Mesopotamia and the countries and protectorates in the Arabian Peninsula. At the time, borders within the Arabian Peninsula were also in flux. The Saudis were rapidly consolidating their power, and creating what would eventually become known as Saudi Arabia. In May 1922, in the Treaty of Mohammara,¹⁰¹ and then in more detail in December 1922, in the Uqair Protocol,¹⁰² the British defined a border between Iraq and the Najd (later Saudi Arabia). The Uqair Protocol also addressed the border with Kuwait, which was then a British protectorate.¹⁰³ The boundary delimitation was the first ever in the Arabian Desert. The boundary between Iraq and Kuwait was entirely artificial, and intended to serve the needs of British policy.¹⁰⁴ It was resented by the Kuwaitis, as it greatly reduced the size of the emirate.¹⁰⁵

Upon the end of the Mandate in 1932, the newly independent state of Iraq opposed British proposals to demarcate the border with Kuwait more precisely. Iraq thought the Mandatory border gave it far too little access to the sea and

99. See generally LIONEL BEEHNER, "THE IRAQI KURDISH QUESTION" (Council Foreign Rel. 2007), <http://www.cfr.org/turkey/iraqi-kurdish-question/p13136>.

100. STEPHEN MANSFIELD, *THE MIRACLE OF THE KURDS: A REMARKABLE STORY OF HOPE REBORN IN NORTHERN IRAQ* 74–76 (2014). The borders between Iraq and Syria were also undefined, and ultimately were created by a series of treaties between Britain and France. *Franco-British Convention on Certain Points Connected with the Mandates for Syria and the Lebanon, Palestine and Mesopotamia*, 16 AM. J. OF INT'L L. (SUPPLEMENT) 122, 122–26 (1922); see also 1 LAWRENCE MARTIN AND JOHN REED, *THE TREATIES OF PEACE, 1919–1923* (2006).

101. See U.S. DEP'T ST., INTERNATIONAL BOUNDARY STUDY NO. 111 IRAQ-SAUDI ARABIA BOUNDARY 10 (1971) [hereinafter *Iraq-Saudi Arabia Boundary Study*].

102. Agreement Concerning the Boundary Between Nejd and Kuwait, Kuwait–Nejd, Dec. 2, 1922, 1750 U.N.T.S. 531, 533, <https://treaties.un.org/pages/showDetails.aspx?objid=08000002800b3b06>. The northern part of Kuwait's border with Iraq follows the Anglo-Turkish Agreement of July 29, 1913.

103. The border was established through a Protocol to the Treaty of Muhammara of 1922. See *supra* note 102, at 533; *Iraq-Saudi Arabia Boundary Study*, *supra* note 101, at 10.

104. *Iraq-Saudi Arabia Boundary Study*, *supra* note 101, at 13.

105. See H.R.P. DICKSON, *KUWAIT AND HER NEIGHBOURS* (1956) ("At the Uqair Conference . . . Sir Percy drew border of Iraq and Gulf States, giving territory claimed by Saudis to Iraq, and claimed by Kuwait to Saudis, and creating two neutral zones.").

unjustly assigned two strategic Gulf islands to Kuwait.¹⁰⁶ Thereafter, successive Iraqi governments refused to recognize the British-drawn border. At a minimum, they claimed the two islands. More broadly, they argued that Kuwait was an integral part of Iraq, unjustly detached by the British.¹⁰⁷ When Kuwait became independent in 1961, Iraq mobilized troops and threatened to annex the new country, a move forestalled by the deployment of British troops.¹⁰⁸ In 1990, Iraq did invade Kuwait, and claimed to acquire sovereignty over the “nineteenth province.”¹⁰⁹

The Iraqi position never generated any international support. The 1990 Iraqi capture of Kuwait was forcibly reversed in 1991.¹¹⁰ In the aftermath of the 1991 Gulf War, the U.N. Security Council created a border demarcation commission that established the Iraqi-Kuwaiti border along the Mandatory lines.¹¹¹

The Mandatory border with Saudi Arabia also created an unusual and anomalous feature: a diamond-shaped “neutral zone” between the countries.¹¹² This feature of the Mandatory borders persisted into independence, until it was eliminated through an agreed-upon partition between the two countries.¹¹³

B. The Mandate of Syria

The French Mandate for Syria and the Lebanon was subject to a series of violent and protracted disputes over borders. During the Mandate, France at various times partitioned, ceded, and reapportioned parts of the mandated territory. The borders it established were all contested on territorial-sovereignty and ethnic-self-determination grounds. Some of the border actions by the Mandatory were manifestly illegal at the time they were taken. Nonetheless, the borders of both Lebanon and Syria followed the territorial arrangement at the end of their respective Mandates.

106. E. LAUTERPACHT ET AL., *THE KUWAIT CRISIS: BASIC DOCUMENTS* 80 (1990). Kuwait enjoyed 310 miles of coastline, and Iraq, only 36. See Bishara A. Bahbah, *The Crisis in the Gulf—Why Iran invaded Kuwait*, in *BEYOND THE STORM: A GULF CRISIS READER* 50–51 (Phyllis Bennis & Michael Moushabeck eds., 1991).

107. *Id.*

108. Iraq complained to the Security Council that Kuwait was “part of its territory.” U.N. SCOR, 16th Sess., 960th mtg. at 2, U.N. Doc. S/PV.960 (July 7, 1961), http://www.un.org/en/ga/search/view_doc.asp?symbol=S/PV.960.

109. See EYAL BENVENISTI, *THE LAW OF OCCUPATION* 150 (2004).

110. See generally RICHARD LOWRY, *THE GULF WAR CHRONICLES: A MILITARY HISTORY OF THE FIRST WAR WITH IRAQ* (2008).

111. See S.C. Res. 773, ¶¶ 2–4 (Aug. 26, 1992); U.N. Secretary-General, Letter dated May 21, 1993 from the Secretary-General to the President of the Security Council, app. at ¶¶ 27–40, U.N. Doc S/25811 (May 21, 1993).

112. See PHEBE MARR, *THE MODERN HISTORY OF IRAQ* 2 (1985).

113. See *Saudis and Iraq Sign Pact Ending Border Dispute*, N.Y. TIMES (Dec. 28 1981), <http://www.nytimes.com/1981/12/28/world/saudis-and-iraq-sign-pact-ending-border-dispute.html>.

1. Lebanon

At the San Remo Conference in 1920, the Allied Powers agreed to bestow upon France the “Mandate for Syria.”¹¹⁴ The Mandate was also included in the ill-fated Treaty of Sèvres in 1920.¹¹⁵ Because Turkey failed to ratify the Treaty of Sèvres, France unilaterally began implementation of what was then called the Mandate for Syria and the Lebanon in 1920, before later receiving League approval in 1922.¹¹⁶

As its name suggests, the Mandate was actually comprised of several distinct territories, though their boundaries were not defined by the Mandate. France eventually divided the Mandate into six states. On September 1, 1920, General Gouraud proclaimed the establishment of the “State of Greater Lebanon.”¹¹⁷ (The “State of Damascus” was established two days later.)¹¹⁸ In 1926, the French established the Lebanese Republic, transforming Greater Lebanon into a state with a constitution and democratically elected government.¹¹⁹ In 1943, the Free French government held elections and ended the Mandate in November, with Lebanon becoming an independent state. Syria would become independent on April 17, 1946, at the end of the war.¹²⁰

Geographically, Lebanon was based on the Mutasarrifia of Mount Lebanon, an autonomous Maronite Christian area that had been detached from Syria in 1861 under European pressure. However, in 1920, France also seized predominantly Muslim regions of Syria (formerly the Ottoman vilayet of Damascus), including the port of Tripoli and the Bekka hinterland, and annexed them to the new Lebanon.¹²¹ The creation of the larger Lebanese state was widely seen as a move to strengthen France’s Christian allies and punish Syria for its 1920 rebellion against French rule.¹²²

The borders established and reestablished by the Mandatory were strongly opposed by Arab nationalist supporters of a “Greater Syria.” They also received a hostile reception from the Muslim population of the reassigned areas, as the move effectively put them under Christian rule.¹²³ In addition to raising historic

114. San Remo Resolution, *supra* note 83, at § (c).

115. Treaty of Sèvres, *supra* note 84, at art. 94 § 7.

116. *French Mandate for Syria and Lebanon*, 17 AM. J. INT’L L. (SUPPLEMENT) 177, 177–82 (1923); *see generally* PHILIP SHUKRY KHOURY, SYRIA AND THE FRENCH MANDATE: THE POLITICS OF ARAB NATIONALISM, 1920-1945, at 77–82 (2014).

117. *See* KAIS FIRRO, INVENTING LEBANON: NATIONALISM AND THE STATE UNDER THE MANDATE 15–30 (2003).

118. *See* EMMA JORUM, BEYOND SYRIA’S BORDERS: A HISTORY OF TERRITORIAL DISPUTES IN THE MIDDLE EAST 19 (2014).

119. *See* LEBANESE CONSTITUTION, May 23, 1926. The Lebanese Constitution, promulgated in 1926, is still in force (with amendments) today.

120. *See* FIRRO, *supra* note 117, at 21.

121. *See* JORUM, *supra* note 118, at 53; FIRRO, *supra* note 117, at 79.

122. *See* FIRRO, *supra* note 117, at 84.

123. MEIR ZAMIR, LEBANON’S QUEST FOR NATIONAL IDENTITY 1926–1939 5 (2d ed. 2000).

and ethnic claims, Syrians pointed out that the annexation of Syrian areas to Lebanon put Damascus within easy reach of the Lebanese border and gave Beirut control of vital rail and shipping routes.¹²⁴ Throughout the 1920s, Syrian leaders continued to demand the return of the detached regions, or at least the port of Tripoli.¹²⁵

Arab nationalists regarded Lebanon as an “artificial creation” that destroyed the territorial integrity of Syria.¹²⁶ These claims were pressed during the 1926 Syrian revolt, which led the French to suggest revising the 1920 division by “surrendering” Tripoli back to Syria.¹²⁷ Tripolitan Sunnis petitioned the League of Nations, arguing that they had been incorporated into the Lebanese state “without their agreement or consent.”¹²⁸ The Syrians also continued to argue that Syrian territory could not be prescribed by the Mandatory and that the doctrine of national self-determination further undermined the legitimacy of the Lebanese annexation.¹²⁹ However, the plan to “surrender” Tripoli was not implemented. Since the termination of the Mandate and the independence of Lebanon, the country has been regarded as having the borders as modified by the French annexation of the four Syrian districts.¹³⁰

2. Alexandretta/Hatay

During its administration of Syria, France created a number of administrative units. The Sanjak of Alexandretta was an autonomous subunit of Aleppo. The Sanjak consisted of 1800 square miles of land on the Mediterranean coast of Syria, bordered on the west by the Gulf of Iskendrun and Turkey to the north, and including the cities of Antioch and Alexandretta. The area has a highly heterogeneous population, composed of Turks, Sunni Arabs, Alawites, Armenians, and many other groups.¹³¹

France, the Mandatory for Syria and the Lebanon, concluded a separate peace agreement with Turkey in 1921, which guaranteed a special regime for Alexandretta with rights for the Turkish population.¹³² Pursuant to this, Turkey renounced all claims to the territory and France guaranteed linguistic and other minority rights to the Turkish population in the territories under its control.¹³³

124. *Id.*

125. *See id.* at 7–17.

126. *See JORUM, supra* note 118, at 54–57.

127. *See generally* MICHAEL PROVENCE, *THE GREAT SYRIAN REVOLT AND THE RISE OF ARAB NATIONALISM* (2009).

128. DANIEL PIPES, *GREATER SYRIA: THE HISTORY OF AN AMBITION* 63 (1992).

129. *See generally* JORUM, *supra* note 118.

130. *See* S. C. Res. 1559, ¶ 1 (Sep. 2, 2004).

131. *See generally* YÜCEL GÜÇLÜ, *THE QUESTION OF THE SANJAK OF ALEXANDRETTA* (2001).

132. Treaty of Ankara, Fr.–Turk., art. 7–8, Oct. 20, 1921, 54 L.N.T.S. 178–93.

133. *See generally* Robert B. Satloff, *Prelude to Conflict: Communal Interdependence in the Sanjak of Alexandretta 1920-1936*, 22 MIDDLE E. STUD. 147 (1986).

These arrangements were affirmed in the next few years in the Treaty of Lausanne, as well as other agreements.¹³⁴

Thus, Hatay was a part of Syria, and Turkey had renounced any sovereignty claims there.¹³⁵ In 1936, France announced it would give Syria—including Alexandretta—independence in a few years. This led Turkey to doubt the continued validity of the minority protections it had secured for Alexandretta, and, consequently, led a reenergized Turkish Republic to reopen claims to the area. Istanbul's legal grounds for title were quite obscure, and relied mostly on the special administrative arrangements for Alexandretta that France had guaranteed. The next several years were marked by riots and sectarian violence, apparently instigated, at least in part, by Kemalist forces. While Turks were a plurality of the population in the territory, they constituted perhaps only 39% of the population.¹³⁶ Ankara appealed to the League's Mandates Commission, which responded on May 29, 1937, by requiring even greater autonomy for the territory, with a separate legislature for internal matters, but nonetheless keeping it under Syrian sovereignty and external control.¹³⁷

Turkey continued to press for control over the territory, and eventually France was willing to comply, apparently seeking to secure Ankara as an ally against German expansion.¹³⁸ Between 1937 and 1938, France agreed to at least four different "solutions" to the Alexandretta issue "in an attempt to appease escalating Kemalist claims."¹³⁹ In 1938, Paris ignored the results of the local assembly elections that opposed Turkish control, while allowing Ankara to send troops to police the area. Growing concern about Germany led to an ever more accommodating French policy. The transfer of Alexandretta to Turkey was completed with a formal cession by France on June 23, 1939, without any approval

134. See generally OFF. REPS. & ESTIMATES, U.S. CENT. INTELLIGENCE AGENCY, THE HATAY QUESTION 15 (1947) [hereinafter CIA, HATAY QUESTION], http://www.foia.cia.gov/sites/default/files/document_conversions/89801/DOC_0000256977.pdf. A final demarcation of the Turkish-Syrian border by a commission took place in 1926. See Majid Khadduri, *The Alexandretta Dispute*, 39 AM. J. INT'L L. 406, 408 (1946).

135. See Elizabeth Picard, *Retour au Sandjak*, in MAGHREB-MACHREK 49 (1983); see also Avedis K. Sanjian, *The Sanjak of Alexandretta (Hatay): Its Impact on Turkish-Syrian Relations (1939-1956)*, 10 MIDDLE E. J. 379, 383 (1956) (noting Turkey had ceded sovereignty claims in Alexandretta in favor of Syria, not France).

136. See Satloff, *supra* note 133, at 154.

137. See generally *Collection of Texts Concerning the Sanjak of Alexandretta*, League of Nations Doc. C.282.M.183 (1937).

138. See Sanjian, *supra* note 135, at 381.

139. See Satloff, *supra* note 133, at 175. These arrangements ranged from ever greater degrees of autonomy to a Franko-Turkish condominium.

by the League.¹⁴⁰ The territory was incorporated into Turkey as the vilayet of Hatay,¹⁴¹ and most of its non-Turkish inhabitants fled in the following years.

The transfer of Alexandretta to Turkey clearly violated the League's Mandate, which provided in Article 4 that "the Mandatory shall be responsible for seeing that no party of the territory of Syria and the Lebanon is ceded or leased or in any way placed under the control of a foreign power," as well as the 1937 League decision about the status of the territory.¹⁴² The legality of the French action was criticized in a June 1938 meeting of the League Mandates Commission, but the coming of World War II prevented the League from convening and taking any action.¹⁴³

The Syrian Mandate was terminated and Syria emerged as an independent state on April 17, 1946.¹⁴⁴ Syria did not recognize the cession of Hatay, and upon independence planned to pursue the issue at the International Court of Justice or the Security Council.¹⁴⁵ However, chronic Syrian instability and a series of coups in the first decade of independence prevented any vigorous response from Damascus.¹⁴⁶ Syria never recognized Turkish sovereignty over the area, and it continues to be a major obstacle to relations between the two countries in recent times.¹⁴⁷ Syria's position is that the French cession was illegal and that Turkey is an occupying power. Nonetheless, it appears that the entire international community recognizes Hatay as being under Turkish sovereignty, and has since 1939.¹⁴⁸

The Alexandretta/Hatay episode is quite significant for understanding the application of *uti possidetis juris* to Mandates. The territory was severed from Syria in gross contravention of the Mandate and the directives of the League, and in serious tension with expressions of local democracy and self-determination. Yet Turkish sovereignty is entirely undisputed by the international community, and there is no evidence of protest since 1939.

140. J.C. HUREWITZ, *THE MIDDLE EAST AND NORTH AFRICA IN WORLD POLITICS: A DOCUMENTARY RECORD-BRITISH-FRENCH SUPREMACY, 1914-1945*, at 545 (J.C. Hurewitz ed., 1979).

141. D.H. Miller, *My Diary at the Conference of Paris* (1919), reprinted in *THE MIDDLE EAST AND NORTH AFRICA IN WORLD POLITICS* 175 (J.C. Hurewitz ed., 1979); see generally CIA, *HATAY QUESTION*, *supra* note 134.

142. Khadduri, *supra* note 134 at 424; see also Sanjian, *supra* note 135, at 381-82.

143. See Khadduri, *supra* note 134 at 425; CIA, *HATAY QUESTION*, *supra* note 134.

144. SAMI M. MOUBAYED, *DAMASCUS BETWEEN DEMOCRACY AND DICTATORSHIP* xxii (2000).

145. Sanjian, *supra* note 135, at 382-83.

146. See KARL D. ROUEN, *DEFENSE AND SECURITY: A COMPENDIUM OF NATIONAL ARMED FORCES AND SECURITY POLICY* 793 (2005).

147. Emma Lundgren Jorum, *Syria's Lost Province: The Hatay Question Returns*, *THE CARNEGIE ENDOWMENT FOR INT'L PEACE* (Jan. 28, 2014), <http://carnegieendowment.org/syriaincrisis/?fa=54340>.

148. See *id.*

The apparent paradox of international equanimity in the face of rampant illegality can be easily understood once one considers the principle of *uti possidetis juris*. While legally flawed, the transfer of Alexandretta to Turkey was consummated while the Mandate was still in effect. When Syria became independent, Alexandretta was no longer included in the Mandatory borders, and the prior sovereign (the French Mandatory) no longer considered Alexandretta to be within the boundaries of the Syrian Mandate. While the transfer may have been illegitimate and was opposed by Syrian officials, it did change the Mandatory boundaries as administered by the French. And *uti possidetis juris* applies to administrative borders as they existed at the moment of independence; Syria came into being without Hatay. Thus while France's action may have violated its international obligations, this does not weaken Turkish sovereignty or establish a territorial claim for the independent Syrian republic. It is also important to note that the various French partitions and cessions of Syrian territory themselves proceeded along the lines of preexisting administrative units.

C. Togoland

Togoland had been a German protectorate on the coast of West Africa since 1884. The Germans were ousted by a joint Anglo-French operation in 1914. The territory was provisionally divided into British and French administrative zones. The 1919 Milner-Simon agreement between Britain and France established the boundaries, with only slight regard to ethnic considerations.¹⁴⁹ This partition became the Mandatory borderline when the League confirmed Mandates for British and French Togolands in 1922,¹⁵⁰ covering respectively about two-thirds and one-third of Togoland's territory.

British and French Togolands, like all the former German African territories, were designated as "Class B" Mandates.¹⁵¹ The borders of the "Class B" Mandates were often drawn largely for the convenience of the Mandatory power, as part of deals and global horse-trading among European states,¹⁵² rather than based on self-determination, or other interests, of the local people. Thus, Mandatory lines both split single ethnic groups and conjoined disparate ones.¹⁵³ Indeed, Lloyd George noted that under the League plan, "the country was cut into

149. See generally PAUL NUGENT, *SMUGGLERS, SECESSIONISTS AND LOYAL CITIZENS ON THE GHANA-TOGO FRONTIER: THE LIFE OF THE BORDERLANDS SINCE 1914* (2002).

150. France had hoped to keep the German West African territories out of the Mandates system. See WILLIAM ROGER LOUIS, *ENDS OF BRITISH IMPERIALISM: THE SCRAMBLE FOR EMPIRE, SUEZ, AND DECOLONIZATION* 281 (2006).

151. JAMES CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* 742 (2d ed. 2006).

152. See LOUIS, *supra* note 150, at 281 (describing British and French cross-Mandate trading of territory).

153. See Brian Digre, *French Colonial Expansion at the Paris Peace Conference: The Partition of Togo and Cameroon*, 13/14 *PROC. MTG. FRENCH COLONIAL HIST. SOC.* 219, 221 (1990).

small bits, and it would be found that half of a tribe was under a mandate, and the other half was not.”¹⁵⁴

After World War II and the collapse of the League, these Mandates became trusteeship territories under the oversight of the United Nations and its Trusteeship Council.¹⁵⁵ The British trusteeship territory (known as Togoland’s Gold Coast) became part of the new independent Republic of Ghana in 1957, after its population voted in favor of an independent state.¹⁵⁶ The French territory gained independence as the Togolese Republic in 1960.¹⁵⁷

British Togoland was by far the less economically developed of the two. The UK administered the Mandate from its neighboring Gold Coast colony, integrating it with the rail and commercial system. The British long favored the notion of ultimately incorporating Togoland into the Gold Coast. Yet during World War II, questions arose about the fate of British Togoland. The division of Togoland split the Ewe people between the French and British sections. (Some also lived on the Gold Coast.) The Ewe organized into a national movement that favored a single political entity for the people. They pressed this issue at the UN Trusteeship Council, in what for a decade would be known as the “Togo Question.”¹⁵⁸ The Ewe argued for “Ewe Unification,” while other ethnic groups argued this would lead to “disintegration.” In particular, “pan-Ewe” groups argued that division of the German colony between the British and French in 1919 was arbitrary and could not be made permanent—the “natural” or historic political boundaries were those of all of Togoland(s).¹⁵⁹

The Trusteeship Council summarily ruled out any plan to combine the two different territories.¹⁶⁰ In 1954, Britain announced that it would promptly be granting independence to the Gold Coast, and ending its trusteeship of Togoland.¹⁶¹ This led to intensive discussions in the Trusteeship Council on the future of the territory. Because of its administrative and economic integration with the Gold Coast, it was widely thought Togoland could not stand alone and would have to choose unification with the newly independent former British colony.¹⁶²

After sending a mission of experts to the territory and studying their report, the Council decided on conducting a referendum to determine Togoland’s

154. *Id.*

155. CRAWFORD, *supra* note 151, at 742.

156. *Id.*; G.A. Res. 1044 (XI) (Dec. 13, 1956).

157. CRAWFORD, *supra* note 151, at 742; G.A. Res. 1416 (XIV) (Dec. 5, 1959).

158. GEORGE THULLEN, PROBLEMS OF THE TRUSTEESHIP SYSTEM: A STUDY OF POLITICAL BEHAVIOR IN THE UNITED NATIONS 131–32 (1964). The Ewe were approximately one-third to one-half the population of British Togoland, and half the population of the French Togoland.

159. For a history of pan-Ewe unification efforts under the Mandate, see D.E.K. Amenumey, *The Pre-1947 Background To The Ewe Unification Question: A Preliminary Sketch*, 10 TRANSACTIONS HIST. SOC’Y GHANA 65 (1969).

160. See THULLEN, *supra* note 158, at 142–43.

161. *Id.* at 150–51.

162. *Id.*

future. The crucial questions were the geographic scope of the plebiscite and the options to be presented in the plebiscite. Upon British insistence, the referendum question would only offer two choices—unification with the newly independent Gold Coast, or a continuation of trusteeship. Unification with French Togoland was not an option, though it might be the ultimate result of the second option. The Mission report recommended that the territory be divided into four units for the plebiscite, so that majorities in each could decide that unit's future. It envisioned the possible division of the territory.¹⁶³ The Council rejected this proposal on the grounds that the future of the territory had to be determined “as a whole.”¹⁶⁴

The results of the plebiscite supported union with the Gold Coast, and the General Assembly approved the dissolution of trusteeship “on the date that the Gold Coast becomes independent and the union with it of the Territory of Togoland under British administration takes place.”¹⁶⁵ This took place on March 6, 1956, with the new unified state being known as Ghana. Thus, British Togoland's merger with the neighboring Gold Coast—and the elimination of the northern 1919 border—was simultaneous with the end of the international regime. In the 1960s and 70s, following the independence of French Togoland—now simply called Togo—a new Ewe nationalist movement arose in the former British Togoland. Ewe groups, organized as “Tolimo,” sought secession from Ghana and union with Togo on the grounds that the Anglo-French partition was illegitimate.¹⁶⁶ These efforts attracted no international support and had no effect on the borders.

D. Cameroon

The Cameroon area was part of the German colony of Kamerun until occupied by British, French, and Belgian forces during World War I. The League issued two “Class B” Mandates in 1922 covering different parts of Kamerun, which, like Togoland, was partitioned between the British and French. Britain received a Mandate for a long narrow sliver on the western end of the territory,¹⁶⁷ while the French received a Mandate for the bulk of Cameroun (defined as the French West Africa).¹⁶⁸ The British divided their Mandatory territory into two sections, Northern and Southern Cameroons, which were administered separately—the latter directly as an autonomous province, and the former as part of Nigeria. British Northern Cameroons was predominantly Muslim (like French Cameroun), while the Southern Cameroons was predominantly Christian.¹⁶⁹

163. *Id.* at 157.

164. *Id.* at 158.

165. G.A. Res. 1044 (XI), *supra* note 156, at ¶ 2.

166. See David Brown, *Borderline Politics in Ghana: The National Liberation Movement of Western Togoland*, 18 J. MOD. AFR. STUD. 575, 575–605 (1980).

167. See generally *British Mandate for the Cameroons*, art. 1, 17 AM. J. INT'L L. 138 (1923).

168. *French Mandate for the Cameroons*, art. 1, League of Nations Doc. C.449M.345(e) 1922 VI (1922); CRAWFORD, *supra* note 151, at 742–43.

169. See generally Edwin W. Ardener, *The Nature of the Reunification of Cameroon*, in AFRICAN INTEGRATION AND DISINTEGRATION: CASE STUDIES IN ECONOMIC

The reunification of the arbitrarily partitioned territory of German Kamerun by the Mandates became a prominent political cause after World War II.¹⁷⁰ The British, however, resisted and marginalized calls for reunification. Similarly, South Cameroonian efforts at independence of one or both of the British Cameroons were ignored by the British.¹⁷¹

The French-mandated territory declared independence as the Republic of Cameroon in 1960.¹⁷² The U.N. General Assembly and Trusteeship Council then called for a referendum in the British territories. As a result of the referendum in 1961, Southern Cameroons joined the Republic of Cameroon, while the Northern territories joined Nigeria.¹⁷³ In the British referendum, each administrative unit—North and South—voted as a separate unit. Thus the referendum arrangement, like the British administration of the Mandate, effectively partitioned the Mandate into two separate territories. Moreover, in the referendum, the British Cameroons were not given a choice of independence, only of union with Nigeria or the Republic of Cameroon.¹⁷⁴

Thus, the British and French Mandates for Cameroon gave rise to numerous potential objections to the borders as they stood at the end of the Mandates—objections to the impairment of territorial sovereignty by the Republic of Cameroon, and objections to the denial of self-determination and improper annexation by South Cameroonian secessionists. In the early 1960s, the Republic of Cameroon objected to the outcome of the referendum process, noting that had the vote of the British Cameroons been counted in a single district, the union with the Republic would have prevailed.¹⁷⁵ The International Court of Justice refused to issue a judgment on the merits in the case, because the Republic of Cameroon itself agreed that the union of Northern Cameroons and Nigeria had been “consummated,” and that, therefore, the union could not be reversed. Instead, the Republic of Cameroon requested a purely declaratory finding that such an action, though irreversible, was wrongful. The Republic of Cameroon’s admission was therefore a strong confirmation of the *uti possidetis juris* principle.¹⁷⁶ There was no question that even the wrongful administration and partition of the Mandate against the sovereign rights of the Republic of Cameroon could not revise

AND POLITICAL UNION 285–337 (Arthur Hazlewood ed., 1967); E.J. Arnett, *The French Mandate in Cameroons*, 37. J. ROYAL AFR. SOC’Y 191 (1938) (discussing French administration of the Mandate).

170. See Martin Z. Njeum, *Reunification and Political Opportunism in the Making of Cameroon’s Independence*, 41 PAIDEUMA: MITTEILUNGEN ZUR KULTURKUNDE 27, 29–33 (1995) (Ger.).

171. See CARLSON ANYANGWE, *IMPERIALISTIC POLITICS IN CAMEROUN: RESISTANCE & THE INCEPTION OF THE RESTORATION OF THE STATEHOOD OF SOUTHERN CAMEROONS* 33–34 (2008).

172. G.A. Res. 1349 (XIII), ¶ 11 (Mar.13, 1959).

173. G.A. Res. 1608 (XV), ¶ 6 (Apr. 21, 1961).

174. ANYANGWE, *supra* note 171, at 34–35.

175. See Northern Cameroons (Cameroon v. U.K.), 1963 I.C.J. 15, 17–18 (Dec. 2).

176. See *id.* at 20.

Nigeria's borders as established at the end of the Mandate.¹⁷⁷ Indeed, in subsequent border disputes between Nigeria and the Republic of Cameroon, the International Court of Justice has confirmed that the border follows the Anglo-French partition of German Kamerun under the Mandates.¹⁷⁸

A secessionist group emerged in southern Cameroon challenging the unification with the Republic of Cameroon in 1961. It has apparently gained strength in recent years and has reportedly faced violent suppression from the Cameroonian government.¹⁷⁹ Today, a wide body of nationalist sentiment in southern Cameroon still argues that the local population has never been allowed to exercise its right of self-determination and that its land has been colonized by the Republic of Cameroon.¹⁸⁰

Southern Cameroonians challenged their incorporation into the Republic of Cameroon to the African Commission of Human Rights,¹⁸¹ which concluded that the complainants represent a distinct people entitled to self-determination.¹⁸² In the oral arguments, the *uti possidetis* issue was raised by the commissioners. The petitioners responded that South Cameroons was not part of the Republic of Cameroon when the *latter* attained independence, which is certainly true,¹⁸³ but it is the date of the termination of the Mandate and independence for the former that matters for purposes of *uti possidetis juris*.

The South Cameroonian secessionists also argue that the plebiscite procedure by which South Cameroons was incorporated upon the conclusion of the British Mandate was improperly conducted in a way that did not allow for the

177. *Id.* at 33–35.

178. See Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nig.; Eq. Guinea Intervening), Judgment, 2002 I.C.J. Rep. 303 (Oct. 10).

179. See Oscar Rickett, *The Ignored Struggle for an Independent English-Speaking Cameroon*, VICE (Nov. 7, 2013), <http://www.vice.com/read/english-speaking-cameroonians-are-being-persecuted-for-wanting-a-state-of-their-own>.

180. See generally Fonkem Achankeng, *Betrayal and Abandonment: Memory, History, and Conflict Emotions in the Narratives of British Southern Cameroons' Nationalists*, in NATIONALISM AND INTRA-STATE CONFLICT IN POSTCOLONIAL AFRICA (Fonkem Achankeng ed., 2014).

181. See also the Nigerian court decision on this subject, discussed in Nelson Enonchong, *Foreign State Assistance in Enforcing the Right to Self-Determination Under the African Charter*: Gunme & Ors v. Nigeria, 46 J. AFR. L. 246 (2002), which ordered Nigeria to institute an International Court of Justice action to determine whether Southern Cameroons was properly incorporated into Cameroon in 1961.

182. African Union, *26th Activity Report of the African Commission on Human and Peoples' Rights (ACHPR) Submitted in Accordance with Article 54 of the African Charter on Human and Peoples' Rights*, Mgwanga Gunme v. Cameroon, Annex 4, 266/2003 (2009), http://www.chr.up.ac.za/images/files/documents/ahrdd/theme02/african_commission_26th_activity_report.pdf.

183. See generally MARTIN AYONG AYIM, *FORMER BRITISH SOUTHERN CAMEROONS JOURNEY TOWARDS COMPLETE DECOLONIZATION, INDEPENDENCE, AND SOVEREIGNTY: A COMPREHENSIVE COMPILATION OF EFFORTS AND HISTORICAL DOCUMENTATION* (Martin Ayong Ayim ed., 2010).

exercise of self-determination.¹⁸⁴ Nonetheless, the South Cameroonians' challenges to British South Cameroons' joinder with Cameroon at the expiration of the Mandate over the former have not won any international acceptance, despite their colorable self-determination claim.¹⁸⁵

The Cameroons Mandates illustrate several relevant points. Most importantly, *uti possidetis juris* applies to Mandatory borders at the time of independence, even when independence does not involve the self-determination of the local people, and even when there is arguable illegality in the establishment of borders and transfer of territory to other states by the Mandatory.

Additionally, Cameroon is an example of the application of *uti possidetis juris* to partitions of a Mandate. The League authorized two Mandates that partitioned German Kamerun. Britain then divided the British Cameroons into two separately administered districts. The relevant *uti possidetis juris* unit was the Mandatory administrative unit at the time of independence. Questions about pre-independence partition, or demands for subsequent partition after the moment of independence, gain no traction.

E. Partitions and Joinders—Ruanda-Urundi

It is worth noting several further situations involving the partition of mandated territory (Lebanon was arguably a case of partition, and arguably a case of quasi-annexation, as the division did not follow prior boundaries). While partition has been urged in multiple contexts—Togoland for the Ewe; Syria along multiple lines; Iraq for the Kurds—the only “partition plans” that affected subsequent international borders were those that were implemented at or before the moment of independence. This Article focuses here on one more case of partition, namely, Ruanda-Urundi. This Article addresses the partition that created Transjordan later as part of our broader analysis of the Palestine Mandate.¹⁸⁶

The two kingdoms of Burundi and Ruanda were annexed to German East Africa in the late nineteenth century. They fell under Belgian control in World War I, and a Mandate was approved by the League of Nations in 1922. Belgium thus became the administering State for the unified territory of Ruanda-Urundi.¹⁸⁷ Upon independence, by mutual consent, the territory divided into two new independent Republics of Rwanda and Burundi on June 1, 1962.¹⁸⁸ These remain the undisputed borders,¹⁸⁹ despite their massive failure to accommodate ethnic realities. The partition has made the Tutsis a minority in both countries, and the Hutus a

184. See generally Piet Konings & Francis B. Nyamnjoh, *The Anglophone Problem in Cameroon*, 35 J. MOD. AFR. STUD. 207 (1997).

185. The African Commission dismissed the case for lack of temporal jurisdiction.

186. See *infra* Part III.

187. MARTIN LAWRENCE, 1 THE TREATIES OF PEACE 1919–1923 xvi (2007).

188. CRAWFORD, *supra* note 151, at 743; G.A. Res. 1746 (XVI), ¶ 1 (June 27, 1962).

189. See U.S. DEP'T STATE, OFFICE OF THE GEOGRAPHER, INTERNATIONAL BOUNDARY STUDY NO. 72, BURUNDI-RWANDA BOUNDARY 5 (1966).

majority, with well-known catastrophic results.¹⁹⁰ Nonetheless, post-genocide suggestions to repartition the two parts of the Belgian Mandate into new ethno-states have been widely considered impossibly radical.¹⁹¹

F. Exclaves: Walvis Bay (Namibia)

Walvis Bay, on the coast of what is now Namibia, had been established by the Cape Colony in 1878, several years before the establishment of Namibia's predecessor colony, German South-West Africa. Walvis Bay had been explicitly excluded from the borders of German South-West Africa upon its establishment in 1884.¹⁹² When the Union of South Africa was formed in 1910, Walvis Bay and nearby islands became part of the new country.¹⁹³

South African forces captured German South-West Africa during World War I. In 1920, South Africa received a "Class C" Mandate from the League to administer the territory.¹⁹⁴ The mandated territory retained the borders of South-West Africa, which had been established by treaties in the late nineteenth century. Walvis Bay was clearly not included in the Mandate.¹⁹⁵

Nonetheless, upon taking the South-West Africa Mandate, South Africa "for reasons of expedience,"¹⁹⁶ from 1922 administered Walvis Bay as part of South-West Africa, though the outlying islands continued to be directly administered from the Cape Province.¹⁹⁷ At the same time, the relevant South African legislation made clear that the territory remained an integral part of the Cape Province, rather than South-West Africa.¹⁹⁸

In 1966, the United Nations General Assembly adopted Resolution 2145 (XXI), asserting that it was terminating South Africa's Mandate over South-West Africa and creating its own direct administration.¹⁹⁹ The Resolution was highly controversial as a legal matter, and its effect on the ground was limited because South Africa refused to yield power and it continued its administration of the

190. See generally GERARD PRUNIER, *THE RWANDA CRISIS: HISTORY OF GENOCIDE* (1995).

191. See, e.g., GODFREY MWAKIKAGILE, *CIVIL WARS IN RWANDA AND BURUNDI: CONFLICT RESOLUTION IN AFRICA* 588–89 (2013).

192. C. Hedlam, *The Race for the Interior*, in *THE SOUTH WEST AFRICA/NAMIBIA DISPUTE: DOCUMENTS AND SCHOLARLY WRITINGS ON THE CONTROVERSY BETWEEN SOUTH AFRICA AND THE UNITED NATIONS* 18, 20 (John Dugard ed., 1973).

193. John Dugard, *Namibia-South Africa: Treaty on Walvis Bay*, 33 INT'L LEGAL MATERIALS 1526, 1526 (1994).

194. *Mandated Territory*, ENCYCLOPEDIA BRITANNICA ONLINE, <http://www.Britannica.Com/Topic/Class-C-Mandate> (last visited Jan. 12, 2016).

195. Ronald Dreyer, *Dispute over Walvis Bay—Origins and Implications for Namibian Independence*, 83 AFR. AFF. 497, 503 (1984).

196. See *South Africa: Act to Provide for the Transfer to Namibia of the Territory of and Sovereignty Over Walvis Bay and Certain Islands*, 22 I.L.M. 1573, 1574 (1993).

197. Dugard, *supra* note 193, at 1526.

198. Dreyer, *supra* note 195, at 503.

199. G.A. Res. 2145 (XXI), at 2–3 (Oct. 17, 1966).

territory for several more decades.²⁰⁰ In 1970, the International Court of Justice ruled that Pretoria must withdraw from Namibia (the new name for South-West Africa) to satisfy the latter's right to self-determination. Faced with the possibility of losing its administration of Namibia, South Africa in 1977 placed Walvis Bay under the administration of the Cape Province.²⁰¹

Namibia's independence movement demanded a complete South African withdrawal from the territory of South-West Africa—and also claimed Walvis Bay as an integral part of the territory.²⁰²

Some observers argued that the Namibian arguments were more political than legal. Walvis Bay, though tiny in size, was of extraordinary economic and strategic significance. It was Namibia's only natural harbor and an important transit point for trade and fishing. Some went so far as to argue that Namibia would not be viable as a country without the harbor.²⁰³ Moreover, South Africa's naval base there would allow for it to dominate the new State of Namibia.²⁰⁴

But Namibian nationalists made legal arguments as well. In particular, they claimed that Namibia had rights to the coastal enclave as part of Namibian "territorial integrity."²⁰⁵ They also claimed that since South Africa had administratively treated Walvis Bay as part of South-West Africa, it had functionally joined it to the Mandate, or, at the least, created a situation in which it was estopped from arguing against such a claim.²⁰⁶

South African sovereignty over Walvis Bay received significant international acceptance, notwithstanding Namibian claims.²⁰⁷ Moreover, the United Nations Committee on South-West Africa regarded Walvis Bay as not being part of the territory of South-West Africa, but rather a sovereign part of South Africa.²⁰⁸ Similarly, the U.S. Department of State's International Boundary

200. See CARSTEN STAHN, THE LAW AND PRACTICE OF INTERNATIONAL TERRITORIAL ADMINISTRATION: VERSAILLES TO IRAQ AND BEYOND 103–106 (2008); BERNHARD KNOLL, THE LEGAL STATUS OF TERRITORIES SUBJECT TO ADMINISTRATION BY INTERNATIONAL ORGANIZATIONS 96–108 (2008).

201. "Walvis Bay Municipality," WHERE TO STAY, <http://walvisbaymunicipality.wheretostayonline.com> (last visited Jan. 12, 2016).

202. See RICHARD DALE, THE NAMIBIAN WAR OF INDEPENDENCE 117 (2014).

203. See *id.* at 176.

204. See VICTOR L. TONCHI ET AL., HISTORICAL DICTIONARY OF NAMIBIA 458 (2012).

205. SURYA PRAKASH SHARMA, TERRITORIAL ACQUISITION, DISPUTES, AND INTERNATIONAL LAW 32 (1997).

206. See Gregory P. Goeckner & Isabelle R. Gunning, Note, *Namibia, South Africa, and the Walvis Bay Dispute*, 89 YALE L.J. 903, 909 (1980).

207. See JOHN DUGARD, THE SOUTH WEST AFRICA/NAMIBIA DISPUTE: DOCUMENTS AND SCHOLARLY WRITINGS ON THE CONTROVERSY BETWEEN SOUTH AFRICA AND THE UNITED NATIONS 531, 533 (1973) (George Kennan observing that the Bay's "status . . . as a complete South African coastal enclave has never been questioned" and it would "remain under South African administration" upon Namibian independence).

208. Comm. on South West Afr. to the Gen. Assembly, Rep. and Observations of the Comm. on South West Africa Regarding Conditions in the Territory of South West

Study for South Africa/Namibia in 1972 concluded that “since annexation [in 1878] Walvis Bay has remained an integral part of Cape Colony or its successor, the present Cape of Good Hope Province of the Republic (formerly Union) of South Africa.”²⁰⁹ Indeed, from after World War II until the mid-1970s, as the dispute over South-West Africa intensified, “South Africa’s sovereignty in respect of Walvis Bay was never questioned.”²¹⁰ A series of International Court of Justice advisory opinions and judgments about the territory treated Namibia as territorially congruent with South-West Africa, and did not challenge the exclusion of Walvis Bay from Namibia.

However, when South Africa put Walvis Bay back directly under its administration in 1977, much of the world reacted unfavorably. A concerted effort was made to give legal backing to Namibian claims to the enclave. This effort found its greatest success in a General Assembly resolution which “declare[d] that Walvis Bay is an integral part of Namibia” and “categorically condemn[ed] South Africa for the decision to annex Walvis Bay, thereby attempting to undermine the territorial integrity and unity of Namibia.”²¹¹

In the General Assembly meetings, African, Soviet-bloc, and Third World nations overwhelmingly denounced the “colonialism” of the “racist regime” in Pretoria and insisted that Walvis Bay was an integral part of Namibia. Western nations, however, made clear that Namibia’s claim was not primarily a legal one, and voiced their disagreement with the General Assembly Resolution, making clear that their support for unification was due to “moral and pragmatic” rather than legal reasons.²¹²

One major argument for Namibian control over Walvis Bay was that South Africa had administered it as part of Mandatory South-West Africa until 1977. This created a kind of estoppel—South Africa had treated Walvis Bay as

Africa, ¶ 10, U.N. Doc. A/291, supp. 12 (1955) (concluding that in international law “the area remains nevertheless an integral part of the Province of the Cape of Good Hope”); Comm. on South West Afr., Rep. and Observations of the Committee on South West Africa Regarding Conditions in the Territory, ¶ 59 n. 28, U.N. Doc. A/3906 (1958) (noting that the territory is “an integral part of South Africa” despite being “administered as part of South West Africa”).

209. OFF. OF THE GEOGRAPHER, U.S. DEP’T OF STATE, INT’L BOUNDARY STUDY NO. 125: SOUTH AFRICA–NAMIBIA (SOUTH-WEST AFRICA) BOUNDARY 2 (1972). U.S. Government maps clearly indicated Walvis Bay as part of South Africa, unlike Namibia. See *Namibia and Walvis Bay* (1978), <http://babel.hathitrust.org/cgi/pt?id=pur1.32754073481727;view=1up;seq=1>.

210. Albert J. Hoffman, *Walvis Bay* ¶ 9, MAX PLANCK ENCYCLOPEDIA (2009).

211. G.A. Res. 32/9(D), ¶¶ 7–8, 22–23 (Nov. 4, 1977).

212. See Statement by Representative of Austl., U.N. GAOR, 32nd Sess. 57th plen. mtg. at 992, U.N. Doc. A/32/PV.57 (Nov. 4, 1977). Practical considerations were also emphasized by African states, which spoke of “the impracticability of maintaining a foreign presence in a country,” and recalling the recent “experience of India with Portuguese Goa.” Of course, whether South Africa would be “in” Namibia was precisely the question to be answered, and Goa cuts against Namibia, as Lisbon’s sovereignty was not questioned until India’s 1962 conquest.

“part” of Namibia and could no longer reverse that treatment. The argument, however, is quite weak as South Africa always insisted that the administration did not change the legal status of Walvis Bay, and was purely a matter of expedience. Moreover, South-West Africa was a “Class C” Mandate, which the Mandatory could administer as an integral part of its own territory—thus administering its own territory with Mandatory territory should not change the status of the latter absent express cession. Indeed, while Pretoria’s administrative status for Walvis Bay certainly weakened the perceived legitimacy of its sovereignty in certain quarters, it did not ultimately undermine it.

One point bears emphasizing: even the strongest argument against South African sovereignty was principally an *uti possidetis juris* argument about Mandatory borders. The Namibian argument took for granted that the only possible lines for new states would be those of their Mandatory borders—and the only question, therefore, was whether the pre-independence borders of Namibia were properly understood to include Walvis Bay.²¹³

While in 1977 the General Assembly endorsed Namibian legal claims to the territory—in a marked reversal of the Assembly’s position for the preceding three decades—the Security Council rejected this approach. Instead, the Security Council passed a resolution calling for the “reintegration” of Walvis Bay into Namibia while it was under South African control.²¹⁴ The Security Council resolution pointedly failed to repeat the legal conclusions of the Assembly, leaving sovereignty over the territory “for negotiation between South Africa and Namibia.”²¹⁵ More importantly, the Council did not include Walvis Bay in Resolution 435, the major UN resolution promoting plans for Namibian independence.²¹⁶

As the United States made clear when it voted on Security Council Resolution 432, the Council specifically decided to avoid adopting the Assembly position on “disputes of a legal character concerning the various claims as to the status of Walvis Bay.”²¹⁷ The United States and other major powers further made clear that they did not understand the resolution to prejudice South Africa’s legal claims to the territory. Indeed, Cyrus Vance’s statement made clear that the call to integrate Walvis Bay was based on policy considerations, not legal entitlement, and did not involve accepting Namibia’s view that “Walvis Bay must be part of an

213. There were some Namibian writers who nevertheless argued strenuously against the application of the doctrine of *uti possidetis juris*, apparently in recognition of the weakness of Namibian claims that the pre-independence administrative boundaries included Walvis Bay. See, e.g., SAKEUS AKWEENDA, INTERNATIONAL LAW AND THE PROTECTION OF NAMIBIA’S TERRITORIAL INTEGRITY: BOUNDARIES AND TERRITORIAL CLAIMS 46–47, 50–53 (1997).

214. S.C. Res. 432, ¶ 1 (July 27, 1978).

215. ROBERT JENNINGS & SIR ARTHUR WATTS, I OPPENHEIM’S INTERNATIONAL LAW 307 n.43 (9th ed. 2008).

216. See S.C. Res. 435 (Sep. 29, 1978).

217. *United Nations Security Council: Resolutions and Statements on Namibian Independence*, 17 I.L.M. 1308.

independent Namibia.”²¹⁸ The effect of these resolutions was to weaken South Africa’s moral, but not legal claim, according to Ian Brownlie, who in 1979 saw South African sovereignty as a straightforward proposition.²¹⁹

When a newly democratizing South Africa agreed to end its presence in Namibia, the question arose of whether this would include Walvis Bay. Namibia strongly insisted on its sovereignty over Walvis Bay, and even included its territorial claim in its Constitution.²²⁰ South Africa strongly disagreed. In practice, Namibia achieved independence in March 1990 without Walvis Bay. South Africa retained control over the territory and the two countries agreed in 1991 to establish a joint committee to discuss the future of the area.²²¹ Finally, in 1994 South Africa agreed to transfer Walvis Bay and the nearby islands by treaty to Namibia. Notably, the treaty contained parallel language reflecting the position of each side about the legal status of the transfer of control: “Walvis Bay shall be reincorporated/integrated in the Republic of Namibia”²²²

The Walvis Bay episode demonstrates both the primacy of *uti possidetis juris* and its functional flexibility. Both South Africa and Namibia asserted title to the territory based on *uti possidetis juris* with the primary arguments concerning the location of the administrative boundaries and the time of independence. And while both sides asserted these legal arguments for decades, they ultimately resolved the dispute on pragmatic grounds while paying lip service to the contradictory legal claims.

III. THE PALESTINE MANDATE

Having looked at other Mandates we now turn to the Palestine Mandate. The Palestine Mandate was one of the three “Class A” Mandates created out of the colonial and imperial possessions of the Ottoman Empire.²²³ Palestine was

218. *Id.*; see also U.N. SCOR, 33d Sess., 2082nd mtg. at 6, U.N. Doc. S/PV/2082 (July 27, 1978) (statement by representative of Federal Republic of Germany endorsing views expressed by Vance).

219. IAN BROWNLIE, *AFRICAN BOUNDARIES: A LEGAL AND DIPLOMATIC ENCYCLOPEDIA* 1287 (1979).

220. THE NAMIBIAN CONSTITUTION (1990), art. 1(4), <http://unpan1.un.org/intradoc/groups/public/documents/cafrad/unpan002607.pdf>.

221. See Agreement on the Joint Administration of Walvis Bay and the Off-Shore Islands, Namib–S. Afr., 32 I.L.M. 1152, 1155 (1993).

222. Treaty Between the Government of the Republic of South Africa and the Government of the Republic of Namibia with respect to Walvis Bay and the Off-Shore Islands, Namib.–S. Afr., art. 2, May 20, 1994, http://peacemaker.un.org/sites/peacemaker.un.org/files/NA-ZA_940228_WalvisBayTreaty.pdf. Similarly, the implementing South African legislation said that Walvis Bay was “part of” South Africa, which it “deems desirable to transfer . . . to the Republic of Namibia.” See *South Africa: Act to Provide for the Transfer to Namibia of the Territory of and Sovereignty over Walvis Bay and Certain Islands*, 33 INT’L LEGAL MATERIALS 1573, 1574 (1994) (emphasis added).

223. UPTHEGROVE, *supra* note 68, at 17.

awarded to Britain with the charge of reconstituting a national home for the Jewish people.²²⁴

Both the boundaries and the status of the Palestine Mandate developed over several years. Britain seized control of the land that would eventually become Palestine during the latter half of World War I, consolidating its control by 1918, before the idea of creating Mandates had crystallized.²²⁵ In April 1920, with a British military administration already in place, the allied powers (Britain, France, and Italy, together with representatives of Japan, Greece, and Belgium) met in San Remo, Italy and decided to divide Ottoman imperial territories between Britain and France, with Britain receiving the Mandates of Palestine and Mesopotamia, and France being awarded Syria and the Lebanon.²²⁶ At the time, negotiations with Turkey (successor to the vanquished Ottoman Empire) had not yet been concluded. Nonetheless, while the territories of Palestine, Mesopotamia, and Syria were still technically within Turkey's sovereign territory, Britain and France instituted Mandatory rule. By July 1, 1920, Britain had appointed the first High Commissioner of the Palestine Mandate.²²⁷ But the formalities of the Mandate's legal personality and territory would not be fully sorted out until 1923.

In Sèvres, Switzerland, in August 1920, Turkey signed a treaty of peace with the 13 allied powers, including Britain, in which Turkey surrendered sovereignty over Palestine, Mesopotamia, and Syria, and agreed to the establishment of a Mandate in Palestine charged with establishing a national home for the Jewish people. The Treaty of Sèvres did not delineate the boundaries of Palestine, and it did not propose a charter for the Palestine Mandate, leaving this to be determined by the principal allied powers and approved by the League of Nations.²²⁸ Unfortunately, the Treaty of Sèvres was never ratified by Turkey. In the midst of civil war and war with its neighbors (Greece, Armenia, and French Syria), the ruling parties in Turkey changed, and the new government repudiated the Treaty of Sèvres.²²⁹ War in Asia Minor continued for several years before negotiations upon a replacement treaty were concluded.

A. Boundaries

Notwithstanding this hiccup, Britain and France set about establishing the borders of the new Mandates. As a preliminary matter, it is useful to see the map of the Mandate of Palestine, shown in Figure 1.²³⁰

224. See British Mandate for Palestine, 17 AM. J. INT'L L. 164, 164, 170 (Supp. 1923) [hereinafter Palestine Mandate].

225. ISAIAH FRIEDMAN, THE QUESTION OF PALESTINE: BRITISH-JEWISH-ARAB RELATIONS, 1914–18, at 129 (2d ed. 1973).

226. See FROMKIN, *supra* note 90, at 10–11.

227. *Id.*

228. Treaty of Sèvres, *supra* note 84.

229. See generally KIESER, *supra* note 85.

230. Note: Figure is copied from <https://upload.wikimedia.org/wikipedia/commons/6/69/BritishMandatePalestine1920.png>, which indicates it is in the public domain.



Figure 1

As the map illustrates, the territory of the Mandate of Palestine, as initially established and approved by the League of Nations, includes all of modern day Jordan, Israel, and areas under Palestinian control, including the areas subject to conflicting Israeli and Palestinian claims. The figure, however, is misleading, because while the general contours of the Mandate were known, the precise boundaries had not been drawn.

One of the first tasks of the Mandatory, therefore, was to draw up the boundary between Palestine and Syria-Lebanon, as well as the boundaries between Palestine and Mesopotamia (Iraq) and between Palestine and Arabia. By the end of 1920, the two countries reached agreement on the first of the so-called Paulet-Newcombe Agreements—the Anglo-French Convention of December 23, 1920—fixing the borders of Syria with Mesopotamia and with Palestine.²³¹ This set the northern border of Palestine, although the border was modified subsequently by the Anglo-French Agreement of March 7, 1923.²³² The eastern border of Palestine with Mesopotamia/Iraq was an internal British matter (since both Mandates were British), and the border remained a matter of controversy for some time.²³³ The eastern border of Palestine with the Hedjaz and ultimately with Saudi Arabia

231. Agreement between His Majesty's Government and the French Government Respecting the Boundary Line between Syria and Palestine from the Mediterranean to El Hamme, Gr. Brit.-Fr., No. 1, Mar. 7, 1923, [http://treaties.fco.gov.uk/docs/fullnames/pdf/1923/TS0013%20\(1923\)%20CMD-1910-AGREEMENT%20BETWEEN%20GOV%20&%20FRENCH%20GOV%20RESPECTING%20BOUNDARY%20LINE%20BETWEEN%20SYRIA%20&%20PALESTINE%20FROM%20MEDITERRANEAN%20TO%20EL%20HAMME.pdf](http://treaties.fco.gov.uk/docs/fullnames/pdf/1923/TS0013%20(1923)%20CMD-1910-AGREEMENT%20BETWEEN%20GOV%20&%20FRENCH%20GOV%20RESPECTING%20BOUNDARY%20LINE%20BETWEEN%20SYRIA%20&%20PALESTINE%20FROM%20MEDITERRANEAN%20TO%20EL%20HAMME.pdf).

232. Franco-British Convention on Certain Points Connected with the Mandates for Syria and the Lebanon, Palestine and Mesopotamia, 122 AM. J. INT'L L. (No. 3 Supp. 1922), https://archive.org/stream/jstor-2213236/2213236_djvu.txt.

233. See generally FROMKIN, *supra* note 90.

likewise remained in flux for several years, eventually being settled by a series of agreements during the 1920s.²³⁴

Palestine's western border, on the other hand, was a straightforward matter—in the northwest, the Mediterranean Sea served as a natural boundary, and in the southwest, Palestine inherited the border of the Ottoman Empire with Egypt, which had been a *de facto* protectorate of Britain.²³⁵ Because Palestine was a new entity, the southwestern border was the only one to have been previously demarcated. While it was still formally part of the Ottoman Empire during the nineteenth century, Egypt achieved *de facto* independence in the 1830s as a result of the rebellion of Muhammed Ali.²³⁶ The Ottoman Empire thus began mapping the border between Egypt and the remainder of the Ottoman Empire as early as 1841.²³⁷ After Britain acquired control of Egypt, it pressed for rectification of the border, and increasing tension led to a British demand in 1906 that the Ottomans accept a Rafah-Dead Sea border, as surveyed by the British.²³⁸ The two sides signed a formal boundary agreement on October 1, 1906.²³⁹ This boundary continued to serve as the basis of the subsequent Palestine-Egypt border.

While negotiations with Turkey dragged on, Britain brought its Palestine Mandate to the League of Nations for approval, and on July 24, 1922, the Council of the League of Nations formally approved the Mandate.²⁴⁰ As approved by the Council, the Mandate recognized the grounds for the Jewish people reconstituting their “national home” in Palestine, and charged Britain with establishing the same.²⁴¹ However, the Mandate included an important exception. Article 25 of the Mandate permitted Britain to “postpone or withhold” the provisions of the Mandate recognizing Jewish rights “[i]n the territories lying between the Jordan and the eastern boundary of Palestine as ultimately determined,” subject to the approval of the Council of the League of Nations.²⁴²

The explanation for this curious proviso lay in tension between Britain and its Hashemite Arab allies. The Hashemites understood the British to have promised them control over an Arab state comprising the Hedjaz, Mesopotamia, and Syria (excluding Lebanon). However, the British had also agreed to French control of the Syria Mandate, and the French had made clear that they were not going to honor Hashemite claims in Syria.²⁴³ When the French made good on their

234. See generally *id.*

235. See OFF. GEOGRAPHER, U.S. DEP'T OF STATE, INT'L BOUNDARY STUDY NO. 46 ISRAEL—EGYPT (UNITED ARAB REPUBLIC) BOUNDARY 2 (1965) [hereinafter INTERNATIONAL BOUNDARY STUDY NO. 46].

236. See generally ARTHUR GOLDSCHIDT JR., HISTORICAL DICTIONARY OF EGYPT (4th ed. 2013).

237. See generally *id.*

238. See generally NURIT KLIOT, THE EVOLUTION OF THE EGYPT-ISRAEL BOUNDARY: FROM COLONIAL FOUNDATIONS TO PEACEFUL BORDERS 1–2 (1995).

239. See INTERNATIONAL BOUNDARY STUDY NO. 46, *supra* note 235, at 2.

240. Palestine Mandate, *supra* note 224, at 171.

241. *Id.* at 164.

242. *Id.* at art. 25.

243. See FROMKIN, *supra* note 90, at 438.

threats and deposed the Hashemite ruler in Damascus (the Emir Feisal), the Hashemites dispatched a small armed force northward under the command of Abdullah (the Emir Feisal's brother). However, Abdullah's forces—numbering only 300—had no chance of driving the French out of Syria, and they stopped their northward march midway through eastern Palestine, in the city of Ma'an without ever confronting French forces. Abdullah's forces remained in place for some time, as all considered their next steps.²⁴⁴ Ultimately, the British decided to award the eastern three-quarters of Palestine—better known as Transjordan or Transjordania—to Abdullah. On April 1, 1921, Britain appointed Abdullah the Emir of Transjordan.²⁴⁵ Thereafter, Britain functionally treated Transjordan as an entirely separate governing area, distinct from Palestine. Article 25 provided the legal hook for Britain to ratify this arrangement; Transjordan was the area described in Article 25 of the Mandate. Thus, under Article 25, Britain could treat Transjordan as exempted from the duty to reconstitute a Jewish national home in Palestine.

Accordingly, in September 1922, Britain formally notified the Council that it was exercising its Article 25 authority to withhold application of nearly all the provisions of the Palestine Mandate in Transjordan.²⁴⁶ This ratified the functional division of the Mandate into two distinct administrations—Transjordan and western (or Cisjordanian) Palestine, the latter generally referred to simply as “Palestine.” In Transjordan, the British Mandatory administration cooperated with Abdullah; in Palestine, the British cooperated with the Jewish Agency, as required by the Mandate.

Functionally, Article 25 of the 1922 Mandate, together with the subsequent September 1922 memorandum, cut Transjordan away from the Palestine Mandate.²⁴⁷ The functional eastern boundary of (western) Palestine, for the remainder of the Mandatory period, was the administrative border with Transjordan—the Jordan River, and a line extending south from the Dead Sea (into which the Jordan River empties) to the Red Sea, near Aqaba.

Interestingly enough, while the Mandate did not define boundaries, it did establish in Article 5 that Britain “shall be responsible for seeing that no Palestine territory shall be ceded or leased to, or in any way placed under the control of the Government of any foreign Power.”²⁴⁸

And, indeed, once the British and French concluded their demarcation of the northern border of Palestine in 1923, the external boundaries of (western) Palestine remained stable for the remainder of the Mandatory period.

In 1923, the Turks finally concluded their negotiations for a peace treaty to replace the Sèvres agreement. The 1923 Treaty of Lausanne left in place the

244. MARY CHRISTINA WILSON, KING ABDULLAH, BRITAIN AND THE MAKING OF JORDAN 44 (1990).

245. *Id.* at 73.

246. Palestine Mandate, *supra* note 224, at 171.

247. *See infra* Section III.B.

248. Palestine Mandate, *supra* note 224, at art. 5.

existing Mandatory arrangements and did not contain any special provisions concerning Palestine. The treaty sufficed with a general Turkish renunciation of sovereignty to all its possessions beyond Turkey's borders, acknowledging "the future of these territories and islands [outside Turkish sovereignty had been] settled or [should] be settled by the parties concerned."²⁴⁹

B. Transjordan

As noted, the Mandate for Palestine given by the League to Britain encompassed within its territory the area now known as the Hashemite Kingdom of Jordan. However, Britain divided the Mandate, turning more than 70% of the territory into a separate administrative unit that would become the Emirate and then the state of Transjordan. The functional division is shown in Figure 2.²⁵⁰

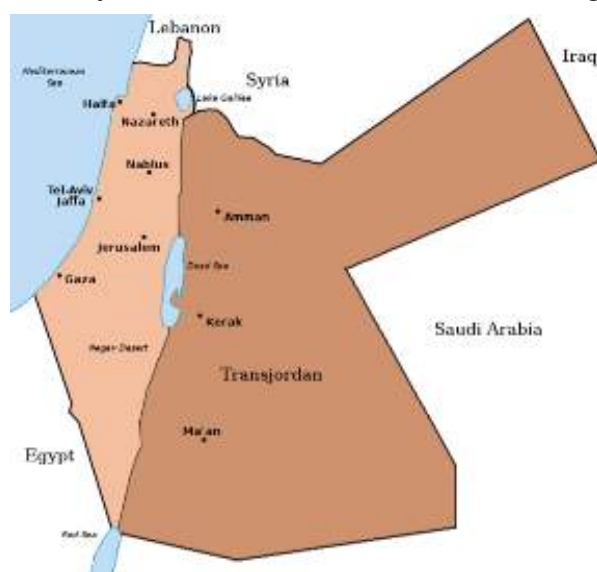


Figure 2

The Palestine Mandate was not the only Mandate partitioned by the Mandatory.²⁵¹ Nonetheless, because our concern is the Palestine Mandate, it is worth paying particular note to the partition authorized by the terms of the Mandate, and then by the League of Nations.

The idea to partition the Mandate was born early in the British administration of Palestine. In 1920, Herbert Samuel, first High Commissioner of the Palestine Mandate, gave a speech in Transjordanian Palestine in which he promised that Transjordan would not be governed under the administration of

249. Treaty of Lausanne, *supra* note 86, at art. 16.

250. Note: Figure is copied from <https://upload.wikimedia.org/wikipedia/commons/3/3d/PalestineAndTransjordan.png>, which indicates it may be reused under a GNU Free Documentation License.

251. See *supra* Part II.

Palestine.²⁵² The arrival in Transjordanian Palestine of Abdullah al-Hussein, a son of the Emir of Mecca in 1921, and the head of a small army, strengthened this conviction. In April 1921, Britain named Abdullah Emir of Transjordan, granting him governing authority in the three Transjordanian districts of Palestine, subject to British supervision.²⁵³ By 1922, the British were committed to partition, and they ensured that Article 25 of the Mandate, adopted in July 1922, allowed Britain “to postpone or withhold application of such provisions of this mandate as he may consider inapplicable to the existing local conditions, and to make such provision for the administration of the territories as he may consider suitable to those conditions.”²⁵⁴ Britain availed itself of this prerogative, and in September, 1922, it dispatched a memorandum to the Secretary General of the League,²⁵⁵ notifying him that the Mandate would not be applying several of the provisions of the Mandate to Transjordan—the listed provisions included all the parts of the Mandate that established Jewish rights (such as the right to reconstitute a national home,²⁵⁶ to immigrate and acquire citizenship,²⁵⁷ to “close settlement on the land,”²⁵⁸ to participate in the administration of the Mandate,²⁵⁹ etc.). The Palestine Order in Council, adopted in August of 1922, likewise provided for separate administration of Transjordan.²⁶⁰

The British went further in 1928, entering into a formal agreement with Emir Abdullah that referred to Transjordan as an “independent state.”²⁶¹ Nonetheless, while Transjordan enjoyed complete local autonomy and minimal actual British oversight, Transjordan remained formally part of the Mandate of Palestine.²⁶² Britain never requested, nor did it ever receive authority from the League to formally partition the Mandate.²⁶³ Britain continued to report to the Council of the League of Nations on its administration of Transjordan as part of its Palestine Mandate annual report until 1943.²⁶⁴

252. WILSON, *supra* note 244, at 46–47.

253. *Id.* at 47.

254. Palestine Mandate, *supra* note 224, at art. 25.

255. *Palestine Mandate: Memorandum by the British Representative*, League of Nations Doc. C.529.M.314.1922. VI 7 (1922).

256. Palestine Mandate, *supra* note 224, at preamble and art. 2.

257. *Id.* at art. 6–7.

258. *Id.* at art. 6.

259. *Id.* at art. 4.

260. See The Palestine Order in Council, part VIII, art. ii, § 86, (Aug. 10, 1922), <https://unispal.un.org/DPA/DPR/unispal.nsf/0/C7AAE196F41AA055052565F50054E656>; see also Benjamin Azkin, *The Palestine Mandate in Practice*, 25 IOWA L. REV. 32, 39 (1939).

261. Agreement between His Majesty and the Amir of Trans-Jordan, Gr. Brit.–Jordan, p. 2, Feb. 20, 1928, T.S. No. 7 (1930).

262. See Leonard Stein, *The Jews in Palestine*, 4 FOREIGN AFF. 415, 415–16 (1926) (“The Mandate remains in force in Trans-Jordan.”).

263. See Official Journal of the League of Nations 1452–53 (1928); see also Azkin, *supra* note 260, at 40.

264. For example, Britain continued to treat Trans-Jordan as part of Palestine for purposes of foreign relations. See MUTAZ M. QAFISHEH, *THE INTERNATIONAL LAW*

While the British were clearly intent on establishing Transjordan as a separate, Hashemite-ruled state, the Mandate did not authorize the removal of any territory from the Mandate of Palestine; it only allowed for the nonapplication of certain provisions. Thus, while it allowed for the separate administration of eastern Palestine, it did not allow for partition; rather, Article 5 stated that “no Palestine territory shall be ceded or leased to, or in any way placed under the control of, the government of any Foreign Power.”²⁶⁵ The French Mandate for Syria and the Lebanon contained an identical Article 5, but also had clear language providing for the establishment of two distinct states in the Mandated area, making clear that Syria and the Lebanon were viewed as two Mandates.²⁶⁶ Moreover, Article 5 was not included among the provisions of the Palestine Mandate suspended by Britain pursuant to Article 25.²⁶⁷ Zionist groups pushed this argument quite strongly in the 1930s and 1940s, and insisted on independence for the complete Palestine, including Transjordan. And the British seemed to be aware of the force of this argument, formally insisting throughout the period that the territories were under a single Mandate.²⁶⁸

Having withheld the applicability of certain provisions of the Mandate in 1922 and granting Jordan autonomy in 1928, Britain went the rest of the way in 1946, recognizing the independence of the Hashemite Kingdom of Jordan, and the termination of the Palestine Mandate there, in 1946. At this point, arguments about the violation of the Mandate could no longer be glossed over.²⁶⁹ For the last two years of the Palestine Mandate (until May 1948), it did not include Transjordan.

FOUNDATIONS OF PALESTINIAN NATIONALITY: A LEGAL EXAMINATION OF PALESTINIAN NATIONALITY UNDER THE BRITISH RULE 47 n.235 (2008).

265. See Azkin, *supra* note 260, at 40.

266. See Gidon Gottlieb, *From Autonomy to a Framework State*, in CONTEMPORARY ISSUES IN INTERNATIONAL LAW: ESSAYS IN HONOR OF LOUIS B. SOHN 493, 496 (Thomas Buergenthal ed., 1984) (distinguishing Lebanon and Syria, which were always two Mandates for two territories, from Transjordan under the Palestine Mandate); *French Mandate for Syria and the Lebanon*, 17 AM. J. INT’L LAW (SUPP.) 177, 177 (1923) (“The Mandatory shall further enact measures to facilitate the progressive development of Syria and the Lebanon as independent states.”) (emphasis added).

267. One might wonder whether establishing a state in eastern Palestine under the Emir would constitute putting it under a foreign power, a point which is not obvious. The Emir was not foreign to Transjordan, but the Jordanian government could be said to be foreign to Palestine. On this point, it is worth considering the judgment of the Supreme Court of Palestine in a 1945 case about visa requirements for Jordanians. The Court addressed whether Transjordan was a separate territory within Palestine, or a separate state, and concluded “Trans-Jordan must be regarded as a foreign state in relation to Palestine.” See generally *Jawdat Badawi Sha’ban v. Commissioner for Migration and Statistics*, 12 L. REP. PALESTINE 551 (1945). The Supreme Court was an institution staffed by British judges, who sometimes, as in this case, sat alongside local ones. See ASSAF LAHOVSKI, LAW AND IDENTITY IN MANDATORY PALESTINE 51–52, 75–76 (2006).

268. See Gottlieb, *supra* note 266, at 496 (“There never were two mandates, one west of the Jordan and the other east of the River.”).

269. Britain addressed these objections, which were raised in the United Nations, by arguing that the international community had acquiesced in “setting up Transjordan as an independent state.” See CRAWFORD, *supra* note 151, at 579.

Upon the independence of Transjordan, the administrative boundary between it and Palestine became the new international boundary, consistent with the doctrine of *uti possidetis juris*. This is despite very strong legal arguments against the severance of the territory from Palestine. Thus, while Jewish nationalist parties continued to claim Transjordan throughout the 1940s and 1950s,²⁷⁰ and Transjordan (and later Jordan) claimed legal rights to territory in Palestine that it captured during its 1948 invasion, neither set of claims received any serious recognition. Indeed, the Jewish authorities of Palestine recognized Transjordan's borders despite any scruple they may have had about its formation.

C. Other Administrative Lines

After the separation of Transjordan, what remained of Palestine functioned under a single Mandatory administration until the termination of British rule in 1948. Throughout the Mandatory period Palestine was divided into several districts for various purposes.

The earliest set of divisions was that left over by the Ottoman Empire. Since the Ottoman Empire did not recognize any entity by the name of Palestine, most of what became the Mandatory territory was organized within Syrian districts (*vilayets*), with Jerusalem receiving separate status as a *Mutasarrifate*.²⁷¹ These divisions were reflected in the earliest British military administration, but the British authorities soon developed their own district administration. The military administration eventually divided western Palestine into thirteen administrative districts, which it then recombined in 1919 into ten districts. With the onset of the Mandatory period came a rapid and bewildering series of changes in district administration. The year 1920 began with nine districts, soon changed to thirteen, and then seven. By October 1922, Palestine was divided into four districts, further divided into eighteen subdistricts. Thereafter, for most of the 1920s and 1930s, Palestine was divided into three districts and eighteen subdistricts, though the borderlines changed. The years 1937, 1938, and 1939 saw three more reshufflings, resulting, ultimately, in six districts and eighteen subdistricts. A final reshuffling came in 1945, when the British authorities redivided Palestine into six districts and sixteen subdistricts.²⁷²

In all of the reshuffling, the role of district government remained limited. Districts were used for certain kinds of municipal governance, including municipal taxation, as well as for census data.²⁷³ While they sometimes reflected municipal or other lines that could render them useful for purposes of partition, they did not constitute lines that separated any fundamental differences in administration. Unsurprisingly, in the many proposals for a second partition of the Palestine

270. See NADAV GERSHON SHELEF, *EVOLVING NATIONALISM: HOMELAND, IDENTITY, AND RELIGION IN ISRAEL, 1925–2005*, at 83–93 (2010).

271. GIDEON BIGER, *THE BOUNDARIES OF MODERN PALESTINE, 1840–1947* 15, 184 (2004).

272. *Id.* at 216.

273. *Id.*

Mandate (following the partition between western and Transjordanian Palestine), the district government boundaries played, at best, a minor role.

D. Proposals for Altering Palestine's Boundaries

The Palestine Mandate was controversial from its very onset. Other Mandates honored, in their own fashion, the rights of self-determination of local populations. The Palestine Mandate, by contrast, elevated the rights of self-determination of a local minority population that was expected to be joined by substantial immigration. Unsurprisingly, this led to clashes between the minority Jewish and the majority Arab populations. With some notable exceptions, Arab efforts were aimed from the start at foiling the emergence of a Jewish polity of any kind—both by blocking immigration of Jews and, more generally, by denying expressions of Jewish self-determination.²⁷⁴ Over time, and after repeated bouts of anti-Jewish violence, some Jewish leaders came to embrace the concept of dividing the Palestine Mandate in order to assuage the conflict, or at least to pass through an interim period when Jewish immigration was insufficient to create a Jewish majority in all of Palestine.²⁷⁵

The earliest formal second partition proposal originated in the late 1930s, in the wake of what was known as the “Arab Revolt.” In 1936, the British appointed a royal commission of inquiry, headed by Lord Peel to investigate the causes of violence and suggest solutions. Jewish Agency chairman David Ben-Gurion proposed a division of Palestine utilizing subdistrict lines,²⁷⁶ but the Peel Commission ultimately adopted a different proposal, which encompassed both western Palestine and Transjordan, dividing them along entirely new lines between proposed Jewish and Arab states.²⁷⁷ The Peel Commission report was initially accepted by the British government, but controversy followed and the report was shelved.²⁷⁸

In 1938, a new commission—the Woodhead Commission—was appointed to propose a different partition of Palestine. The Commission heard and rejected a new Jewish Agency proposal for partition,²⁷⁹ and the Commission Report itself offered two new partition proposals,²⁸⁰ but none won over a majority of the Commission.²⁸¹ Thereafter, the British abandoned the idea of partition. Instead the British favored the geographic unity of (western) Palestine, together with strict limitations on Jewish immigration and legal restrictions on Jewish

274. SAMI ADWAN ET AL., *SIDE BY SIDE: PARALLEL HISTORIES OF ISRAEL-PALESTINE* 27–109 (2012).

275. U.N. DEP'T OF PUB. INFO., *THE QUESTION OF PALESTINE AND THE UNITED NATIONS*, at 9, U.N. Doc. DPI/2499 (2008), <https://unispal.un.org/pdfs/DPI2499.pdf>.

276. See BIGER, *supra* note 271, at 198.

277. *Id.* at 193.

278. *Id.*

279. *Id.* at 206.

280. See PALESTINE PARTITION COMMISSION, *REPORT 1938* (UK), https://archive.org/stream/WoodheadCommission/Woodhead-abbey_djvu.txt.

281. BIGER, *supra* note 271, at 206.

property rights in order to prevent the emergence of a Jewish state.²⁸² This was a clear violation of the terms of the Mandate, but Britain implemented its new policy anyway, beginning in 1939.

After World War II, once the dimensions of the Holocaust had become clear, British opposition to a proposed Jewish state became an increasing source of embarrassment, and partition returned to public deliberations. A new partition map was offered by a British-American committee appointed to consider implementation of a 1946 Anglo-American Commission of Inquiry report. The map, which was known as the Morrison-Grady proposal,²⁸³ won no official approval.²⁸⁴

In 1947, the British turned to the newly created United Nations for suggestions on the fate of the Palestine Mandate, and the UN General Assembly appointed a Special Committee on Palestine (“UNSCOP”) with representatives from 11 states. UNSCOP adopted a plan for partition that it recommended to the General Assembly.²⁸⁵ The General Assembly then slightly modified the plan and, in General Assembly resolution 181 of November 1947, recommended it to the Security Council and to Britain.²⁸⁶ As shown in Figure 3,²⁸⁷ the plan would have divided (western) Palestine into a patchwork of eight pieces, with three pieces going to a Jewish state, four to an Arab state (three large chunks and a small enclave in Jaffa), and one to continued British trusteeship (greater Jerusalem).²⁸⁸ The Security Council, however, took no action on the plan and Britain rejected it.²⁸⁹ A provisional UN authority for Palestine, which was to facilitate implementation of the partition and governance of Jerusalem, was denied entry by Britain, and was ultimately never dispatched.²⁹⁰

282. SEC’Y OF STATE FOR THE COLONIES, BRITISH WHITE PAPER OF 1939, Yale L. Sch.: The Avalon Project, Cmd. 6019 (UK), http://avalon.law.yale.edu/20th_century/brwh1939.asp.

283. ANGLO-AMERICAN COMM. OF INQUIRY, U.S. DEP’T OF STATE, REPORT TO THE UNITED STATES GOVERNMENT AND HIS MAJESTY’S GOVERNMENT, THE UNITED KINGDOM (1946), http://avalon.law.yale.edu/20th_century/angcov.asp.

284. See BIGER, *supra* note 271, at 212.

285. ITZHAK GALNOOR, PARTITION OF PALESTINE: THE DECISION CROSSROADS IN THE ZIONIST MOVEMENT 285 (1995).

286. See G.A. Res. 181 (II), Future Government of Palestine (Nov. 29, 1947), <https://unispal.un.org/DPA/DPR/unispal.nsf/5ba47a5c6cef541b802563e000493b8c/7f0af2bd897689b785256c330061d253?OpenDocument>.

287. *United Nations Partition Plan for Palestine*, WIKIPEDIA.ORG, https://en.wikipedia.org/wiki/United_Nations_Partition_Plan_for_Palestine (last visited July 25, 2016).

288. General Assembly II, *supra* note 286; BIGER, *supra* note 271, at 15, 84.

289. See BIGER, *supra* note 271, at 15, 84.

290. See Stefan Brooks, *British Mandate for Palestine*, in THE ENCYCLOPEDIA OF THE ARAB-ISRAELI CONFLICT: A POLITICAL, SOCIAL, AND MILITARY HISTORY 770 (Spencer C. Tucker ed., 2008).



Figure 3

Given the fact that this was the last partition proposal of any note before the dissolution of the Mandate in 1948, as well as the endorsement of the General Assembly, elements of the proposed 1947 partition continued to play a role in both legal and political discussions about Palestine for decades thereafter. However, the Mandatory government never adopted any of the divisions proposed within the 1947 resolution.²⁹¹

While General Assembly Resolution 181 failed to effect any legal change in Palestine, it had profound real-world effects. Arab irregulars launched attacks on the day the plan was adopted by the General Assembly as part of a larger effort to prevent the creation of a Jewish state, and soon all of Palestine was engulfed in war.²⁹² The Jewish leadership in Palestine had accepted the proposed partition, and in the initial months of the war, fighting concentrated in the areas allotted to a proposed Jewish state by Resolution 181, as well as Jerusalem, with Arab forces attempting to isolate Jewish communities while Jewish forces attempted to keep

291. There are writings that argue that Resolution 181 actually accomplished a partition of Palestine. See, e.g., Anthony D'Amato, *Israel's Borders Under International Law* (Nw U. PUB. L. RES. PAPER No.06-34, 2007), <http://anthonydamato.law.northwestern.edu/Adobefiles/israels-borders-under-international-law.pdf>. These works appear to be based upon a misapprehension of the facts. See *id.* For instance, D'Amato's work presents the resolution as a ratification of a British proposal for partition that the British simultaneously accepted and implemented. See *id.*

292. See MORRIS, *supra* note 14, at ch. 5.

lines of transport open among the communities.²⁹³ The British, who had agreed to withdraw by November 29, 1948, accelerated their departure from Palestine, ultimately exiting on May 15, 1948, while closing down all of the machinery of the Mandate.²⁹⁴ As the British exited on May 15, all the neighboring Arab states, including Transjordan (which had received independence from Britain in 1946), as well as some Arab states not neighboring Palestine, invaded in order to prevent the emergence of a Jewish state.²⁹⁵ On the eve of the British withdrawal, on May 14, Jewish authorities declared the independence of the Jewish state in Palestine, called Israel.²⁹⁶ Local Arab authorities, on the other hand, while rejecting the Jewish state, did not declare or otherwise move to create an Arab state in Palestine.²⁹⁷ Shortly thereafter, the Arab states that had conquered parts of Palestine imposed a military administration on the areas they had seized.²⁹⁸ In September, fearing Transjordanian annexation of parts of Mandatory Palestine, Egypt initiated the creation of an Arab government of “all Palestine,” which, on October 1, declared an independent Arab state in all of Palestine. While six Arab states recognized the new “government” of Palestine, it never exercised any authority anywhere, and it quietly retired to anonymous offices in Cairo and then dissolution.²⁹⁹

The war ended by late 1948, with Israel controlling roughly three-quarters of the territory of the Palestine Mandate. The remaining territory was conquered by Syria, Egypt, and Jordan (the new name of Transjordan). Egypt ruled the conquered parts of Palestine (the Gaza Strip) by military administration, while Transjordan and Syria treated the conquered areas as part of their municipal territories.³⁰⁰ No other Arab state claimed sovereignty within the area. Syria,³⁰¹ Egypt,³⁰² and Jordan³⁰³ all signed armistice agreements with Israel, marking the lines between the territory controlled by Israel and the lands conquered by the Arab states. However, the armistice agreements were clear in stating that the armistice lines were not boundaries and that the parties retained their claims to territorial sovereignty.

293. *Id.*

294. *Id.* at 178–79.

295. *Id.* at ch. 5.

296. DECLARATION OF ESTABLISHMENT OF STATE OF ISRAEL (May 14, 1948), <http://www.mfa.gov.il/mfa/foreignpolicy/peace/guide/pages/declaration%20of%20establishment%20of%20state%20of%20israel.aspx>.

297. MORRIS, *supra* note 14, at 178.

298. *Id.*

299. Avi Shlaim, *The Rise and Fall of the All-Palestine Government in Gaza*, 20 J. PALESTINE STUD. 37, 37–53 (1990).

300. MORRIS, *supra* note 14, at 178.

301. See Armistice Agreement between Israel and Syria, Isr.–Syria, July 20, 1949, UN Doc S/1353.

302. General Armistice Agreement between Egypt and Israel, Egypt–Isr., Dec. 13, 1949, U.N. doc. S/1264/Rev. 1.

303. See Armistice Agreement between the Hashemite Kingdom of Jordan and Israel, Isr.–Jordan, Apr. 3, 1949, UN Doc S/1302.

A fourth armistice agreement was signed with Israel's last neighboring state—Lebanon.³⁰⁴ Because Lebanon had not succeeded in conquering and holding any of the territory of the Palestine Mandate, the armistice line with Lebanon coincided with the prior boundary of the Mandate. Nonetheless, the armistice line had an interesting feature. Like the armistice lines with Israel's other neighbors, the armistice line with Lebanon was established as a military line, without prejudice to the parties' claims to territorial sovereignty.³⁰⁵ Nonetheless, the armistice line was not delineated in relation to the actual military positions of the parties or geographic features. Rather, the line was described as "follow[ing] the international boundary between Lebanon and [the Mandate of] Palestine."³⁰⁶ This is particularly interesting since the Palestine Mandate-Lebanon border would not have been maintained under the proposed partition in General Resolution 181. The map of the armistice lines is shown in Figure 4.³⁰⁷

UN ARMISTICE LINES 1949



Figure 4

304. See Lebanese-Israeli General Armistice Agreement, Isr.-Leb., March 23, 1949, U.N. Doc. S/1296/Rev. 1.

305. *Id.* at art. II–III, V.

306. *Id.* at art. V.

307. U.N. Armistice Lines 1949, WIKIPEDIA, https://upload.wikimedia.org/wikipedia/commons/0/0b/UN_armistice_lines_1949.jpg (last visited July 26, 2016).

Similarly, none of the armistice agreements attempted to utilize the proposed partition lines of Resolution 181 in any fashion. Interestingly, while neither Israel nor any of its neighboring states treated the partition lines as the borders of Israel, and while there were never any moves to create a Palestinian Arab state along the proposed partition lines, there were states outside the region that attempted to hold on to a single feature of the proposed partition that they found genial—the temporary internationalization of Jerusalem. After the war, the General Assembly passed several resolutions calling for Jerusalem to be internationalized.³⁰⁸ Many states refused to recognize Jordanian and Israeli sovereignty over the parts of the city that each controlled,³⁰⁹ and Israel's establishment of Jerusalem as its capital in 1949³¹⁰ was widely dismissed.³¹¹ However, international pique about Jerusalem never translated into any change in administration on the ground, or legal acceptance by Jordan or Israel.

The armistice lines, as established in 1949 and modified by minor adjustments in military lines between 1949 and 1967, are often referred to as the “1967 boundaries.”³¹² As we have seen and will now discuss, the implication that the 1949 armistice lines became Israel's legal borders is difficult to square with the doctrine of *uti possidetis juris*.

IV. APPLYING *UTI POSSIDETIS JURIS* TO THE BORDERS OF ISRAEL

On May 14, 1948, when Israel declared its statehood, its forces controlled only a small part of Palestine. While Israel's geographic scope of authority expanded by the end of the war, the armistice agreements that ended the war in 1949 left large parts of Palestine in the hands of Syria, Egypt, and Jordan.

The doctrine of *uti possidetis juris*, however, rejects possession as grounds for establishing title, favoring instead legal entitlement based upon prior administrative borders. And it is clear that the relevant administrative borders of Palestine at the time of Israel's independence were the boundaries of the Mandate as they had been set in 1923. Israel was the only state that emerged from Mandatory Palestine, and it was a state whose identity matched the contemplated Jewish homeland required of the Mandate and that fulfilled a legal Jewish claim to self-determination in the Mandatory territories. There was therefore no rival state

308. See, e.g., G.A. Res. 303 (IV), Palestine: Question of an International Regime for Jerusalem and the Holy Places (Dec. 9, 1949); G.A. Res. 356 (IV), Budget Appropriations for the Financial Year 1950 (Dec. 10, 1949).

309. See, e.g., C.K. Johnson, *U.S. Policy on Jerusalem: Memorandum Discouraging Nations from Recognizing Jerusalem as the Capital of Israel* (May 31, 1962), http://www.jewishvirtuallibrary.org/jsourc/US-Israel/FRUS5_31_62a.html.

310. See Ben-Gurion, Isr. Prime Minister, Statement to the Knesset by Prime Minister Ben-Gurion, ¶ 5 (Dec. 13, 1949), <http://www.mfa.gov.il/mfa/foreignpolicy/mfadocuments/yearbook1/pages/7%20statement%20to%20the%20knesset%20by%20prime%20minister%20ben-g.aspx>.

311. See G.A. Res. 303 (IV), *supra* note 308.

312. See, e.g., Ethan Bronner, *Netanyahu Responds Icily to Obama Remarks*, N.Y. TIMES, May 19, 2011, at A9; Tim Lister, *Maps, Land and History: Why 1967 Still Matters*, CNN, May 24, 2011, at IV.

that could lay claim to using internal Palestinian district lines as the basis of borders. At the same time, while considerable efforts had been invested in creating and advancing proposals for altering the borders of the ultimate Jewish state and a contemplated companion Arab state, no such efforts were crowned with the success of implementation. Thus, it would appear that *uti possidetis juris* dictates recognition of the borders of Israel as coinciding with the borders of the Mandate as of 1948.

Having seen the workings of the doctrine of *uti possidetis juris* and the prima facie case for applying the doctrine to establish the borders of Israel along the boundaries of the Palestine Mandate, a final question remains: are there any unusual features about Israel's independence that would undermine the conclusion that Israel's borders at independence were the borders of the Palestine Mandate?

This Article considers, first, unusual features of Israel's independence that might undermine the application of *uti possidetis juris*. This Article then considers if the subsequent actions of the affected parties shed any evidence contrary to the understanding that *uti possidetis juris* would apply. Finally, we briefly consider the implications of establishing the borders on the basis of *uti possidetis juris* and potential alterations of the borders in the years since 1948.

Overall, the record shows no reason for rejecting the application of *uti possidetis juris*. It shows that Israel, in various ways, offered to accept the smaller partition borders before independence and that it renewed these offers after independence, as well. However, for purposes of determining the original borders of Israel, the doctrine of *uti possidetis juris* inquires only into the borders as they stood at the time of independence. In making this determination, Israel's subsequent acts are relevant only as they bear on the question of what the pre-Israel borders were understood to be. There is no unequivocal evidence that Israel understood the borders of Palestine to have changed prior to Israel's independence.

The evidence of actions post-independence that might have changed the borders is more equivocal. For the most part, there is insufficient evidence to show any consensual transfer of territorial sovereignty or acquiescence in the creation of new de jure borders. The potential exception to this general rule is the Israeli withdrawal from the Gaza Strip in 2005,³¹³ which might be seen as an abandonment. Additionally, the growing maturity of Palestinian-Arab claims of self-determination, and several Israel-Palestine Liberation Organization agreements that provided for Palestinian-Arab autonomy,³¹⁴ will no doubt prove relevant in the creation of a future boundary when, if ever, an Arab-Palestinian state³¹⁵ achieves independence.

313. See DAVID MAKOVSKY, ENGAGEMENT THROUGH DISENGAGEMENT 22–31 (2005).

314. See generally BARRY RUBIN, THE TRANSFORMATION OF PALESTINIAN POLITICS: FROM REVOLUTION TO STATE-BUILDING (rev. ed. 2001).

315. "Palestine" has since Roman times been a geographic name without an ethnic connotation. Thus under the Mandate for Palestine, "Palestinians" included Jews, Arabs, and all other residents of the territory. Since at least the 1960s, the term "Palestinian"

A. Israel's Independence

The independence of Israel took place in the middle of an armed conflict and political controversy. Together, the events surrounding Israel's independence raise several interesting issues for discussion.

1. Termination

First is the matter of the termination of the Mandate of Palestine. The Mandate did not follow an orderly pattern of termination in which the Mandatory determined to bestow independence upon the Mandate, won approval for its action from the League of Nations, and then terminated the Mandate by agreement. Britain simply abandoned the Mandate on May 15, 1948. The League of Nations no longer existed at the time, and the United Nations, which played a substitutive role of disputed legality,³¹⁶ never voted to accept the abandonment as a termination. The General Assembly did vote to recommend a particular means of terminating the Mandate, but it left implementation of its recommendation to Britain and the Security Council, neither of which chose to follow the recommendation.

Despite all these anomalies, it is difficult to dispute that the Mandate was terminated on May 15, 1948. Disorderly terminations were the norm for the "Class A" Mandates. All of the other "Class A" Mandates were terminated without prior approval of the League of Nations, and in some cases they were terminated without any orderly process at all. The Mandate of Syria and the Lebanon, for instance, "disappeared 'with graceless reluctance.'" In 1941, during World War II, the "Free French" (the opposition French exiles who attempted to exert authority over French interests after the Nazi takeover of France) declared Syrian and Lebanese independence, but the declaration was not universally accepted, even by allies such as the United States. The League, which was no longer functioning, neither approved nor disapproved. France later attempted to reassert its authority in Lebanon without success, and it continued to maintain that the Mandate was in force. Nonetheless, when the League reassembled following the war for its final session, it "welcomed the termination of the mandated status of Syria [and] the Lebanon."³¹⁷

Even Transjordan, granted independence by Britain in 1946, failed to make a smooth exit from the Mandate system. Britain did not request permission from the League of Nations or from the General Assembly (after the League ceased to function) to terminate Mandatory rule in Transjordan. As a result, Poland challenged Transjordanian independence in 1946 when Transjordan applied for UN membership; Jordan was not finally accepted until 1955.³¹⁸

has overwhelmingly been used to refer to the area's Arab population, and a "Palestinian state" to mean an exclusively or overwhelmingly ethnic Arab state within the territory of the former Mandate.

316. CRAWFORD, *supra* note 151, at 576–77.

317. *Id.* at 577.

318. *Id.* at 578–79.

The failure of the League of Nations formally to terminate the Mandate of Palestine is thus neither surprising nor legally significant. It is not necessary to interpret General Assembly Resolution 181 as an implied termination in order to reach the conclusion that the Palestine Mandate was terminated in 1948.³¹⁹

2. Self Determination

Another set of problems related to the Palestine Mandate concerns questions of self-determination. From the outset, the Palestine Mandate was anomalous in that it recognized a particular people as entitled to express their self-determination on the territory of the Mandate, even though that people was not at that time the majority population of the Mandate. Over the years, Palestinian advocates have argued that this portion of the Mandate was *ultra vires*, and that the Jewish people were not entitled to receive a grant of the legal right to self-determination.³²⁰ The argument has little to recommend it.³²¹ But even if the argument were well founded, it would have little effect on the outcome of the *uti possidetis juris* analysis, as we have seen. Even unlawful treatments of the right of self-determination have not been seen as grounds to undermine the *uti possidetis juris* borders of other Mandates.

A potentially more serious matter is the question of whether the Jewish people were the only nation entitled to self-determination in the Mandate of Palestine. The Mandate itself gives no indication of there being another entitled nation, describing only a Jewish national home and no other national home or national expression. The Mandate provides for a single partition (the separation of Transjordan from the remainder of the Mandate), but no other. The Mandate of Palestine was not, of course, the only Mandate to encompass populations who would not be granted the right to self-determination and an independent state (consider, for instance, the Kurds in the Mesopotamian Mandate). However, the Mandate of Palestine was the only one in which the majority population (the Arabs of Palestine) was impliedly denied a right of self-determination by the founding documents. It may be argued that, notwithstanding the silence of the founding documents of the Mandate, the Palestinian Arabs did have a claim to self-determination. General Assembly Resolution 181 of 1947 would have given both the Palestinian Jewish and Palestinian Arab peoples independent states.

The rights of multiple nations to self-determination on a given territory should not, *prima facie*, disturb application of the doctrine of *uti possidetis juris*.

319. Cf. *id.* at 430. (James Crawford oddly argues that the Resolution must be read as having the legal effect of termination because a “[m]andatory could not by its own unilateral act resile from its responsibilities.”). Unilateral acts of that sort—discussed by Crawford elsewhere in his book—were exactly what terminated the Mandates of Syria and the Lebanon, Transjordanian Palestine, and Mesopotamia (Iraq). See generally *id.*

320. E.g., HENRY CATTAN, *PALESTINE AND INTERNATIONAL LAW: LEGAL ASPECTS OF THE ARAB-ISRAELI CONFLICT* 45 (1973); see also QUIGLEY, *supra* note 27, at 66.

321. See Nathan Feinberg, *The Arab-Israel Conflict in International Law: A Critical Analysis of the Colloquium of Arab Jurists in Algiers*, in NATHAN FEINBERG, *STUDIES IN INTERNATIONAL LAW* 433 (1979); CRAWFORD, *supra* note 151, at 178.

This is not simply because the doctrine of *uti possidetis juris* does not rely upon the existence of a prior claim of self-determination for the new state. Nor is it simply because *uti possidetis juris* may actually conflict with and override the demands of self-determination, as the International Court of Justice stated explicitly in the Burkina Faso case.³²² The most important reason for rejecting the idea that multiple claims of self-determination forbid application of *uti possidetis juris* is that many of the states that have had their borders established by *uti possidetis juris* have, in fact, been subject to multiple claims of self-determination; in no case has the existence of an additional nation with a right of self-determination defeated application of the doctrine of *uti possidetis juris*. This is true even when the new state that claimed the benefit of *uti possidetis juris* was later itself driven apart by new internal claims of self-determination. Yugoslavia and the U.S.S.R. provide several examples of this. Consider, for instance, Serbia (later subject to the secession of Kosovo) and Ukraine (later subject to the highly controversial secession of Crimea).

If an Arab-Palestinian state had achieved independence in 1948, alongside the Jewish one, this would have doubtlessly affected the application of *uti possidetis juris*. With two states having achieved independence at the same time within the Mandate of Palestine, it would obviously not be possible for both states to share the borders of the Mandate. Different lines would have to serve as the basis of the borders of each state—if the new states could not reach agreement on mutually acceptable boundaries, the borders of districts or subdistricts would have to do. But, despite the potential self-determination claim of the Arab population of Palestine, only one state was born in 1948 at the termination of the prior administration. As the Palestine Mandate ended, the state of Israel achieved independence. No other state did.

Likewise, if the partition of Palestine envisioned by General Assembly Resolution 181 had been implemented, even if only administratively, the application of *uti possidetis juris* would have changed. Resolution 181 called for a U.N. Commission to take over administration of Palestine as the Mandatory withdrew. The Commission was to “carry out measures for the establishment of the frontiers of the Arab and Jewish States and the City of Jerusalem” and then to assist in the creation of provisional governments before the states achieved independence.³²³ However, the Commission never arrived in Palestine. Neither the Commission nor the Mandatory ever sketched out the proposed frontiers. At no time was a separate administration ever set up for the proposed Jewish, Arab, and Jerusalem territories as called for by the resolution.³²⁴ In short, at the time of independence, there was only one administrative unit in Palestine. To attempt to

322. Frontier Dispute (Burk. Faso/Mali), 1986 I.C.J. 554, 566 (Dec. 22).

323. See G.A. Res. 181 (II), Future Government of Palestine, (Nov. 29, 1947), <https://unispal.un.org/DPA/DPR/unispal.nsf/5ba47a5c6cef541b802563e000493b8c/7f0af2bd897689b785256c330061d253?OpenDocument>.

324. Indeed, the British were quite open in their “attempt[] to forestall the U.N. Assembly’s resolution.” The British Mandate “advanced its withdrawal date from Palestine to 15 May 1948 and did not cooperate with the U.N. Commission.” Asher Maoz, *War and Peace—An Israeli Perspective*, 14 CONSTITUTIONAL FORUM, no. 2, at 36 (2005).

apply *uti possidetis juris* to any borders other than those of the Mandate would leave the remaining Mandatory territories terra nullius, which is exactly the situation the doctrine seeks to avoid.³²⁵

3. Armed Conflict

Israel was born in conflict. The armed conflict surrounding the independence of Israel began in November 1947, with Palestinian Arab attacks on Palestinian Jews, and it continued through Israel's declaration of independence and the invasion of the Arab states in May 1948, until the ultimate end of hostilities in March 1949.³²⁶ At no time during the course of the conflict did Israel ever control all of the territory of the Mandate, and the armistice agreements ending the war did not award Israel possession and forbade non-peaceful changes in the armistice lines.

Armed conflict frequently accompanies the birth of new states, and the workings of the doctrine of *uti possidetis juris* in such cases are perfectly clear. The *status quo post bellum* and the vicissitudes of war do not change boundaries.

B. Israel's Conduct Following Independence

Post-independence conduct can play a role in *uti possidetis juris* cases in showing how the parties viewed the pre-independence administrative boundaries. As we have already considered the boundaries of Palestine as they existed at the time of independence, it remains for us to examine whether Israel's conduct or that of its neighbors *after* the time of independence might show that they believed that new administrative boundaries had been set before the date of independence. As we shall see, while the record is equivocal, the best view of the evidence points to Israel's sovereignty within the full boundaries of the Palestine Mandate in accordance with the doctrine of *uti possidetis juris*.

In reaching this conclusion, it is important to note the importance of actions within the relevant time frame. For purposes of *uti possidetis juris*, the crucial period is that leading up to and including the time of independence. Post-independence conduct is relevant, but only insofar as it bears on evidence of the borders at the "critical date" of independence. Post-independence conduct helps to "obtain[] a clearer picture of the situation on the ground at the critical date." That is, for purposes of *uti possidetis juris*, post-independence conduct does not affect the borders; at most it can provide evidence of what the administrative boundaries were prior to independence.³²⁷ It is the formal acts of the erstwhile sovereign prior

325. Cf. CRAWFORD, *supra* note 151, at ii. (considering the possibility that the establishment of Israel gave Israel sovereignty over the territory it actually controlled and left the remaining Mandatory territory terra nullius). Curiously, Crawford does not consider the possibility that Israel acquired sovereignty over the entire Mandatory territory by operation of *uti possidetis juris*. See *id.*

326. See AMNON RUBINSTEIN & BARAK MEDINA, *THE CONSTITUTIONAL LAW OF THE STATE OF ISRAEL* 269–71 (5th ed. 1996) (Hebrew).

327. Giuseppe Nesi, *Uti Possidetis Doctrine*, in MAX PLANCK ENCYCLOPEDIA OF INTERNATIONAL LAW (R. Wolfrum ed., 2011).

to independence that have a “paramount role” in establishing borders, rather than the subsequent acts of the new state.³²⁸

Of course, it is always possible to change borders. Once the original borders have been established—which, according to the doctrine of *uti possidetis juris*, depends on the situation at the critical date of independence—a separate question arises as to whether they have been subsequently modified by cession or other forms of transfer. In these questions, the formal acts of the new sovereign acquire critical importance. The actions of the succeeding power go to cession or modification; the actions of the former power determine initial borders.

The borders of Israel were a matter of great controversy at the time that Israel declared its independence. At the time, the Arab leadership of Palestine (and, likewise, the Arab leaderships of neighboring Arab states) rejected any Jewish state, while the Jewish leadership was committed to a policy of partition.³²⁹ Accordingly, while the Jewish leadership had many objections to the details of the U.N. General Assembly-endorsed partition proposal, it saw the imprimatur of the General Assembly as an important asset, and it therefore endorsed the partition resolution and continued to endorse it, at least provisionally, during the early months of the war.³³⁰ At the same time, the Jewish leadership was open in its doubts about the feasibility of the details of the partition proposal, as well as its reluctance to accept the partition proposal unilaterally.³³¹ By the time of Israel’s declaration of independence, it was clear that the partition proposal would never be implemented, and a fierce debate broke out concerning the ultimate boundaries of Israel.³³² For this reason, Israel’s Declaration of Independence made no mention of borders. The Declaration did cite General Assembly Resolution 181 but recalled it as one of several sources of legitimacy of a Jewish state and nowhere endorsed the particulars of its partition proposal.³³³

The first legislation adopted by Israel’s new Provisional Council of State—the Law and Administration Ordinance of 5708-1948,³³⁴ published on May 19, 1948—contained several indications of Israel’s presumed adoption of the geographic scope of the Mandate. Article 11 of the Ordinance adopted the laws of the Mandate of Palestine as the new state of Israel’s law (with some exceptions), while Article 15 of the Ordinance amended the newly incorporated laws of Israel to refer to Israel wherever the law referred to Palestine.³³⁵ On the other hand, the Area of Jurisdiction and Powers Ordinance,³³⁶ adopted by the Knesset several

328. See *id.* at ¶ 10.

329. BIGER, *supra* note 271, at 190–219.

330. *Id.*

331. *Id.*

332. See *id.*

333. DECLARATION OF ESTABLISHMENT OF STATE OF ISRAEL, *supra* note 296.

334. Law and Administration Ordinance, 5708-1948, art. 1 (1948–87) (Isr.), <http://www.israelawresourcecenter.org/israelaws/fulltext/lawandadministrationord.htm>.

335. *Id.* at art. 11, 15.

336. Area of Jurisdiction and Powers Ordinance, 5708-1948, 29, (1948–87), <http://israelawresourcecenter.org/israelaws/fulltext/areaofjurisdictionpowersord.htm>.

months later, gave a more mixed message. While the Ordinance applied the laws of Israel to all Mandatory areas controlled by the state, in both Articles 1 and 2 of the ordinance, it referred to these areas as “both the area of the State of Israel and any part of Palestine which the Minister of Defense has defined by proclamation as being held by the Israel Defense Forces.”³³⁷

Likewise, some of the messages transmitted by the state of Israel upon its independence were equivocal. For instance, in his letter to the U.S. government asking for recognition of the new state of Israel, Eliahu Epstein, later appointed Ambassador to the United States, wrote that “the state of Israel has been proclaimed as an independent republic within frontiers approved by the General Assembly of the U.N. in its Resolution of November 29, 1947.”³³⁸ However, other transmissions by Israel, such as its notification to the U.N. Secretary General, made no similar mention of boundaries.³³⁹

The equivocation was not an accident. Ben-Gurion notified the Provisional Council that the government had decided to be “evasive” on the matter of borders until it saw whether the U.N. intended to implement Resolution 181. Ben-Gurion stated that Israel’s readiness to respect the resolution depended on whether it would be honored and enforced by the U.N.³⁴⁰ Ultimately, of course, the U.N. took no action to honor or enforce the terms of the partition plan recommended by Resolution 181. While the Resolution called for Security Council action, the partition plan was never brought to a vote in the Security Council.³⁴¹

It is hard to see how this collection of evidence could disturb the conclusion that Israel’s *uti possidetis juris* borders were those of the Palestine Mandate. While the evidence shows that Israel was ready to be held to the much more restrictive borders of the proposed partition, it does not show in any way that Israel believed that the boundaries of the partition had ever been implemented by the Mandatory or had ever become the administrative boundaries prior to Israel’s independence.

Partition, cession, and recombination plans were featured prominently in the League and General Assembly discussions over the Togolands, Walvis Bay, Lebanon, and other Mandatory territories during the pendency of the Mandate. In all cases, only those plans actually implemented resulted in a change of borders at the moment of independence. There is little reason to think differently simply due to Israel’s readiness to accept a compromise solution had one been available.

337. *Id.* at §§ 1–2.

338. See A Decade of American Foreign Policy 1941–1949, Independence of Israel Letter from Eliahu Epstein, Agent of the Provisional Gov’t of Isr., to the President of the U.S., Yale L. Sch.: The Avalon Project (May 15, 1948), http://avalon.law.yale.edu/20th_century/decad169.asp.

339. Foreign Secretary of the Provisional Government of Israel, Israeli UN Membership Application of 15 May 1948, U.N. Doc. S/747 (May 16, 1948), <http://unispal.un.org/UNISPAL.NSF/0/4733DDFC4D8F4ACF80256499004C9E77>.

340. RUBINSTEIN & MEDINA, *supra* note 326, at 83, 269–71.

341. See THE CAMBRIDGE GUIDE TO JEWISH HISTORY, RELIGION, AND CULTURE 269 (Judith R. Baskin & Kenneth Seeskin eds., 2010).

C. Armistice Agreements

At the conclusion of Israel's War of Independence, Israel held the majority of the territory of the Mandate of Palestine. At this point, Israel again offered to entertain proposals for partition, albeit along new lines.³⁴² However, no partition agreements were ever reached. Negotiations with Israel's neighbors resulted in limited armistice agreements, rather than general peace treaties. And no negotiations took place at all with the "all-Palestine government" or any other purported representatives of the local Arab population outside Israel's *de facto* control.

Israel reached armistice agreements with each of its four neighbors—Lebanon,³⁴³ Syria,³⁴⁴ Jordan,³⁴⁵ and Egypt³⁴⁶—and each of the agreements was clear in stating that the armistice lines demarcated the separation of forces (and, therefore, the lines of *de facto* possession), but not the lines of legal entitlement.

Thus, it was clear that there was nothing in the armistice agreements to undermine the application of *uti possidetis juris*.

D. Subsequent Events

The nearly seven decades since Israel's independence have been full of border controversies, as well as changes in possession of territory. Obviously, a full examination of the legal implications of these many events is beyond the scope of this Article.

Uti possidetis juris is a doctrine that establishes boundaries retrospectively to the date of independence. Subsequent conduct can alter those boundaries—not by changing the operation of the doctrine of *uti possidetis juris*, but rather by transferring sovereignty under one of the methods recognized by international law. The traditional list of means of transferring territorial sovereignty include cession (voluntary transfer among states or to a new state) and prescription (long-standing peaceful possession by a non-titleholder).³⁴⁷ Additionally, states may unilaterally abandon title, and they may acquiesce to the acquisition of title by another state, even without a formal cession.³⁴⁸

A full examination of the boundaries of Israel today would require a careful examination of Israel's actions for the past 68 years in order to determine whether any of them succeeded in altering Israel's borders. While it is absolutely clear that Israel has never agreed to any formal cession of its territorial sovereignty to territories within the Palestine Mandate, and that the 19-year Jordanian,

342. MORRIS, *supra* note 14, at 178; ITAMAR RABINOVICH, *THE ROAD NOT TAKEN: EARLY ARAB-ISRAELI NEGOTIATIONS* (1991).

343. See Lebanese-Israeli General Armistice Agreement, *supra* note 304.

344. See Israeli-Syrian General Armistice Agreement, *supra* note 17.

345. See Armistice Agreement Between the Hashemite Jordan Kingdom and Israel, *supra* note 17.

346. See Egyptian-Israeli General Armistice Agreement, *supra* note 17.

347. MALCOLM N. SHAW, *INTERNATIONAL LAW* 495–521 (6th ed. 2008).

348. *Id.*

Egyptian, and Syrian occupation of parts of the Mandate are insufficient to transfer title by prescription, it is more difficult to make categorical statements about abandonment and acquiescence. While we fail to find sufficient evidence of either abandonment or acquiescence, a full examination of the record is beyond the scope of this Article.

However, it is worth noting that all of Israel's peace treaties with neighboring states to date—its peace treaties with Egypt³⁴⁹ and Jordan³⁵⁰—have ratified the borders between Israel and its neighbor as being based on the boundaries of the British Mandate of Palestine. This, too, reinforces the application of *uti possidetis juris* to establish the boundaries of Israel.

E. The State of Palestine

In 1993, Israel began a structured negotiation process with the Palestine Liberation Organization (“PLO”) that was intended to lead to a negotiated and unspecified “final status.”³⁵¹ The agreements set up an interim Palestinian Authority with personal authority over Palestinians in the West Bank and Gaza Strip, but not any part of Jerusalem.³⁵² In addition, the agreements divided the West Bank and Gaza into several zones, giving the Palestinians territorial jurisdiction in areas A, B, and H1 (the other zones are areas C and H2, which comprise the majority of the West Bank).³⁵³ Israel, however, was to maintain ultimate security control over all areas pending the conclusion of final status talks.³⁵⁴ Final status negotiations were scheduled to be completed by 1999,³⁵⁵ but they were unsuccessful, though they have been periodically renewed. It is anticipated that successful conclusion of the final status negotiations would result in the establishment of an Arab state of Palestine within agreed-upon borders.

In 1988, the Palestinian National Council (the legislative wing of the Palestine Liberation Organization) declared an independent state of Palestine.³⁵⁶ The declared state has since won widespread recognition, including by the U.N. General Assembly as a nonmember observer state in 2012,³⁵⁷ but it has never

349. MORRIS, *supra* note 14, at 178.

350. Treaty of Peace, Egypt–Isr., Mar. 26, 1979, 18 ILM 362 (1979).

351. See generally RUBIN, *supra* note 314.

352. The Israeli-Palestinian Interim Agreement (“Oslo II”), Isr.-Palestine (Sept. 28, 1995), <http://www.mfa.gov.il/mfa/foreignpolicy/peace/guide/pages/the%20israeli-palestinian%20interim%20agreement.aspx>.

353. *Id.* at art. XI; Protocol Concerning Redeployment in Hebron, § 2 (Jan. 17, 1997), <http://www.jewishvirtuallibrary.org/jsource/Peace/hebprot.html>; see generally GEOFFREY R. WATSON, THE OSLO ACCORDS: INTERNATIONAL LAW AND THE ISRAELI-PALESTINIAN PEACE AGREEMENTS (2000).

354. See generally WATSON, *supra* note 353.

355. Israeli-Palestinian Interim Agreement (“Oslo II”), *supra* note 353, at art. V.

356. See NEGOTIATIONS AFFAIRS DEPARTMENT OF THE PALESTINIAN LIBERATION ORGANIZATION, PALESTINE NATIONAL COUNCIL DECLARATION OF INDEPENDENCE (Nov. 15, 1988), <http://www.jewishvirtuallibrary.org/jsource/Peace/pncdec.html>.

357. U.N. GAOR, 67th Sess., U.N. Doc. A/Res/67/19 (Nov. 29, 2012), http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/67/19.

fulfilled the legal requirements of statehood, including, most importantly, the existence of a government that exercises control over some territory.³⁵⁸

It is assumed that if negotiations between Israel and the PLO reach a successful conclusion, a new Palestinian state will come into existence within some of the territory of the former Palestine Mandate. At that time, the agreement will specify the boundaries of the new state and, accordingly, strip Israel of territorial sovereignty. If a new state of Palestine were able to seize effective control over territory without agreement, this too might divest Israel of some territorial sovereignty. It might even be possible that a new unilaterally created state of Palestine would use the doctrine of *uti possidetis juris* to claim sovereignty over all of areas A, B, and H1.

Israel's treatment of the Gaza Strip adds an important complication. The Gaza Strip was occupied by Egypt from 1948 until 1967, when it was captured by Israel in the Six Day War. Israel imposed a military administration on the Gaza Strip until 1993; thereafter the Oslo Accords granted the newly created Palestinian Authority territorial jurisdiction to govern the entire Strip, except for Israeli settlements.³⁵⁹ In 2005, Israel withdrew all military forces and expelled all Israeli civilians from the Gaza Strip, relinquishing control over the area.³⁶⁰ The Palestinian Authority lost control of the Strip less than two years later, when Hamas seized the reins of power in a rapid military action.³⁶¹ Hamas has ruled the Gaza Strip since. It has periodically reached agreement with the PLO (or the Fatah organization which is the largest component organization of the PLO) to return Fatah, the PLO, or the Palestinian Authority to the Gaza Strip, but the agreements have never been implemented. Hamas does not subordinate itself to either Israel or the Palestinian Authority, but it does not hold itself out as the government of an independent state either.

The government of the Gaza Strip, therefore, is unique. It is not like the Palestinian Authority administration of areas A, B, and H1 of the West Bank. Nor is it like the Israeli administration of areas C and H2 of the West Bank. The de facto separation of the West Bank and Gaza into three distinct administrations (Hamas in Gaza; the Palestinian Authority in areas A, B, and H1; and Israel military administration in areas C and H2) would potentially affect *uti possidetis juris* borders of a future Palestinian state. Additionally, it is possible to argue that Israel voluntarily abandoned any claims of territorial sovereignty it might have had in the Gaza Strip, although there is no unequivocal documentary evidence of such an abandonment. In any event, developments in the Gaza Strip will no doubt affect future claims of sovereignty in the event of Palestinian statehood.

358. See, e.g., James Crawford, *The Creation of the State of Palestine: Too Much Too Soon?*, 1 EUR. J. INT'L L. 307 (1990).

359. See Israeli-Palestinian Interim Agreement ("Oslo II"), *supra* note 353, at art. XI.

360. See MORRIS, *supra* note 14, at 178.

361. Steven Erlanger, *Hamas Seizes Broad Control in Gaza Strip*, N.Y. TIMES, June 14, 2007, at A1.

Unfortunately, a full legal examination of the potential boundaries of a future state of Palestine is beyond the scope of this Article.

CONCLUSION

This Article has explored the doctrine of *uti possidetis juris*, its status in international law, and its application to the boundaries of Israel.

The doctrine is widely accepted as binding under customary international law, and its application to the case of Israel is straightforward, awarding Israel territorial sovereignty of the disputed areas of the West Bank, the Gaza Strip, and East Jerusalem, pending Israeli surrender of such claims through abandonment or cession. This result is contrary to the common political wisdom but fully in line with application of the law in other contexts.

It is likely that a future peace agreement between Israel and the Palestinians will reflect the parties' presumed desire to accommodate Palestinian self-determination, as well as the right of states to modify existing *uti possidetis juris* borders by agreement. *Uti possidetis juris* is not, therefore, the last word on matters.

At the same time, it is likely that any future solution to the boundary disputes of Israel that wishes to take international law seriously will have to take account of the rules of *uti possidetis juris*. The doctrine is an indispensable starting point for legal discussions of borders.

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**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: **ICC-01/18**
Date: **16 March 2020**

PRE-TRIAL CHAMBER I

Before: Judge Péter Kovács, Presiding Judge
Judge Marc Perrin de Brichambaut
Judge Reine Adélaïde Sophie Alapini-Gansou

SITUATION IN THE STATE OF PALESTINE

PUBLIC

Observations on the Prosecutor's Request on behalf of the Non-Governmental Organisations: The Lawfare Project, the Institute for NGO Research, Palestinian Media Watch, and the Jerusalem Center for Public Affairs

Source: The Lawfare Project
The Institute for NGO Research
Palestinian Media Watch
The Jerusalem Center for Public Affairs

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Introduction

1. In accordance with the Chamber's Order of 20 February 2020 granting the undersigned Organisations leave to submit Observations on the Prosecutor's Request, the undersigned Organisations respectfully submit these written observations on the question of jurisdiction set forth in Paragraph 220 of the Prosecutor's Request with respect to the so-called "Situation in Palestine".
2. As set forth in detail below, under well-settled principles of international law, there is no presently-existing "State of Palestine" capable of referring matters to the International Criminal Court. A State that does not exist is not capable of delegating sovereign jurisdictional competencies to the ICC. Accordingly, the Court lacks jurisdiction with respect to the so-called "Situation in Palestine".

I. The Article 12 Preconditions To The Exercise of ICC Jurisdiction are Not Met Because There Is No "State of Palestine"

3. Article 12 of the Rome Statute prescribes preconditions to the exercise of ICC jurisdiction. These preconditions are predicated on the existence of a State.¹ Specifically, in situations which are referred to the Office of the Prosecutor ("OTP") by a State pursuant to Article 13(a) or (c), or where the OTP has initiated an investigation *proprio motu*, the existence of a State Party is a necessary precondition for the exercise of jurisdiction.²
4. There is no definition of the word "State" in the Rome Statute. Therefore, the term "State" is to have the same meaning as it has in general (customary) international law.³ The customary test of statehood holds that a state must consist of four elements: a defined territory, a permanent population, a government in total control of the territory, and the capacity to engage in foreign relations. These elements are commonly referred to as the Montevideo Criteria.⁴

¹ The word 'State' in Article 12 is, *prima facie*, to be interpreted in accordance with its ordinary meaning. Article 31(1) of the Vienna Convention on the Law of Treaties, Vienna (the "VCLT"), 23 May 1969, United Nations, UN Treaty Series, Vol 1155, p. 331. The VCLT applies to this analysis pursuant to Article 21(1)(b).

² Sovereign legal title to territory on which alleged crimes occur is a precondition to the Court's exercise of jurisdiction for purposes of Article 12(2)(a); the objective existence of a State is a necessary precondition to the Court's exercise of jurisdiction for purposes of Article 12(3) and Article 12(2).

³ See fn. 1, *supra*.

⁴ Convention on Rights and Duties of States, adopted by the Seventh International Conference of American States, 26 December 1934, 165 LNTS 19 (the "Montevideo Convention"), Art I.

5. Under the customary meaning of the term in international law, “Palestine” is not a State.⁵ Its existence, and the status and extent of the territory, is not fixed, and is dependent on a negotiated settlement between Israel and the Palestine Liberation Organization (“PLO”).⁶ Neither is there a permanent population, given the express understanding between the parties that borders are to be determined in final status negotiations. Similarly, “Palestine” lacks a government in total control of the territory.⁷ On the one hand, its purported government shares with Israel control over some territory it claims for itself. On the other hand, there is currently no functioning, unified government that actually exerts control over the entirety of the territory the Prosecutor purports to include in the so-called “State of Palestine.”⁸ Finally, “Palestine” lacks the capacity to engage in foreign relations, as it lacks all other elements of statehood that would allow it to do so.⁹

⁵ Although beyond the scope of this Observation, *amicus curiae* note that since “Palestine” is not a State, its purported accession to the Rome Statute under Article 125 is invalid. To the extent accession was erroneously permitted in light of U.N. General Assembly resolution 67/19 of 29 Nov. 2012, according “Palestine” the status of “non-member observer State” in the UN, it must be noted that this resolution did not purport to make a *legal* determination as to whether “Palestine” qualifies as a state, and was explicitly limited to the UN in its effect. Moreover, the powers granted to the General Assembly by the UN Charter are generally recommendatory and advisory, such that according a status on an entity does not have preclusive or binding legal effect (see Section II below). *See, e.g.*, Voting Procedure on Questions relating to Reports and Petitions Concerning the Territory of South-West Africa, Advisory Opinion, 1955 I.L.J. Rep. 67, 115 (June 7, 1955)(General Assembly resolutions generally “are not legally binding upon the Members of the United Nations...and are in the nature of recommendations”).

⁶ Apart from territorial issues, including border demarcation, other final status issues to be resolved include, but are not limited to, security, water and settlements. This was agreed to by the PLO during the course of negotiating the Oslo Accords. The “Oslo Accords” refers to the series of agreements signed between the State of Israel and the Palestine Liberation Organization as part of a peace process. These agreements include the Declaration of Principles on Interim Self-Government (“DOP”), signed 13 Sept. 1993, available at:

<https://mfa.gov.il/mfa/foreignpolicy/peace/guide/pages/declaration%20of%20principles.aspx>;

The Agreement on the Gaza Strip and the Jericho Area, signed 4 May 1994, available at:

<https://mfa.gov.il/mfa/foreignpolicy/peace/guide/pages/agreement%20on%20gaza%20strip%20and%20jericho%20area.aspx>; and the Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip (the “Interim Agreement”), also known as “Oslo II”), signed 28 Sept. 1995, available at:

<https://mfa.gov.il/mfa/foreignpolicy/peace/guide/pages/the%20israeli-palestinian%20interim%20agreement.aspx>

⁷ Effective government is central to a claim of statehood. This criterion has two aspects: the actual exercise of authority, and the right or title to exercise that authority. To be a state, an entity must possess a government in general (and exclusive) control of its territory.

⁸ Since June 2007, there have been two competing governments in the so-called Palestinian territories: one in what is colloquially referred to as the “West Bank”, and one in the “Gaza Strip”. The West Bank has been governed by what is generally recognized to be the Palestinian Authority, which has been dominated by the Fatah faction since its creation. In the Gaza Strip, Hamas took over governance by force and has remained in power since June 2007. In brief, there is no single government that exerts control over “Palestine”.

⁹ In Article IX (5)(a) of the Interim Agreement, the PLO expressly agreed to limit its conduct of foreign relations: “In accordance with the DOP, the Council will not have powers and responsibilities in the sphere of foreign relations, which sphere includes establishment abroad of embassies, consulates or other types of foreign

6. The Montevideo Convention provides a restatement of customary international law.¹⁰ This restatement was reinforced by the Arbitration Commission of the Conference on Yugoslavia (the “Badinter Commission”), set up by the Council of Ministers of the European Economic Community in August 1991 to provide the Conference with legal advice. According to the Badinter Commission, “the state is commonly defined as a community which consists of a territory and a population subject to an organized political authority; that such a state is characterized by sovereignty”.¹¹ The Badinter Commission’s definition of a state is largely a re-phrasing of the Montevideo Criteria.¹²
7. The Montevideo Criteria remains the prevailing interpretation of customary international law, as shown by the practices of states during the dissolution of Yugoslavia,¹³ the former Soviet Union and Czechoslovakia. As the International Criminal Tribunal for the Former Yugoslavia stated, “These four criteria...have been used time and again on questions relating to the creation and formation of states. In fact, reliance on them is so widespread that in some quarters they are seen as reflecting customary international law”.¹⁴
- A. The “State of Palestine” does not fulfill the Montevideo Criteria because it lacks a defined territory.**
8. With respect to the first of the Montevideo Criteria, the purported “State of Palestine” does not exist because it lacks a “defined territory”. The extent of its territory is not fixed, with the PLO having agreed, during the course of negotiating the Oslo Accords,

missions and posts or permitting their establishment in the West Bank or Gaza Strip, the appointment of or admission of diplomatic and consular staff, and the exercise of diplomatic functions”.

<https://mfa.gov.il/mfa/foreignpolicy/peace/guide/pages/the%20israeli-palestinian%20interim%20agreement.aspx>

¹⁰ Apart from the criteria for statehood set forth in Article I, the Montevideo Convention explicitly states in Article III that “[t]he political existence of the state is independent of recognition by the other states.” Recognition is not determinative of statehood (and neither is statehood determinative of recognition). This reinforces the view that U.N. General Assembly resolution 67/19 is an aspirational and recommendatory statement that conveys no preclusive or binding legal effect.

¹¹ Opinion No. 1, 29 Nov. 1991.

¹² Notably, the Badinter Commission – like the Montevideo Convention – identified “the effects of recognition by other states as purely declaratory”. Opinion No. 1, *supra*. This further reinforces the view that U.N. General Resolution 67/19 is an aspiration, and recommendatory *purely declaratory* statement that lacks preclusive or binding effect. Therefore, the recognition of a “State of Palestine” for the limited purpose of according it a non-member status within the United Nations does not provide a sound *legal* basis for accession to the Rome Statute under Article 125 or as a basis for the exercise of jurisdiction under Article 12.

¹³ See Badinter Commission opinions.

¹⁴ *Prosecutor v. Slobodan Milosevic*, Case No. IT-02-54-T, Decision on Motion for Judgement of Acquittal, ¶86 (Int’l Crim. Trib. for the Former Yugoslavia, 16 June 2004).

to leave the status and scope of the entire territory unresolved, with borders left as a permanent status issue for an agreed-upon settlement at a later date. The issue of Palestinian statehood and the extent of the territory of such a state is a *political* dispute that Israel and the PLO expressly agreed to resolve through a *political* mechanism – negotiations. It is not appropriate for this Court, established to adjudicate individual criminal liability under highly limited and specific circumstances, to substitute its judgment for that of parties to a civil peace process. To do so would constitute an improper exercise of the Court’s jurisdiction in violation of the Rome Statute.

9. From a *legal* perspective, no Palestinian entity holds, or has ever held, sovereign title over the Gaza Strip, Judea and Samaria, or eastern Jerusalem. This territory has always been under the control of other political entities. Judea and Samaria, for example, were occupied by Jordan from 1948 until June 1967, as a result of Jordan waging a war of aggression against Israel, following the latter’s declaration of independence in May 1948 and the departure of British forces. The General Armistice Agreement between the Hashemite Kingdom of Jordan and Israel of 3 April 1949, U.N. Doc. S/1302, expressly stated at Art. VI(9) that “[t]he Armistice Demarcation Lines...are agreed upon by the Parties *without prejudice to future territorial settlements or boundary lines or to claims of either Party relating thereto*”. (Emphasis added). In 1967, when an armed conflict again erupted between Israel and its neighbors (including Jordan), Judea and Samaria did not have a government that could claim to represent their interests as their sovereign. Neither did the Gaza Strip.¹⁵ During the period of Jordanian occupation (1948-1967), the annexation of this territory by Jordan and claims of sovereignty were not generally recognized by the international community.¹⁶ More consequentially, no *Palestinian* state has ever held sovereign title to that territory.¹⁷

¹⁵ The Gaza strip was, effectively, directly administered by an Egyptian military governor from 1949, when it was demarcated in an Egyptian-Israeli armistice agreement, to 1967 when Israel gained physical control of the territory.

¹⁶ Prior to the Jordanian occupation in 1949, Judea and Samaria were governed by Great Britain pursuant to the Mandate for Palestine adopted by the League of Nations on 24 July 1922. The area had been officially under military government since the British occupied it from the Ottoman Empire during World War I. The Mandate provided for the administration of the area by the British with the goal of **establishing the Jewish national home** west of the Jordan River, as stated in the 1917 Balfour Declaration.

¹⁷ To the contrary, it could be argued that the Badinter Commission’s expansive interpretation of *uti possidetis* (which provides, in essence, that an emerging state presumptively inherits its pre-independence administrative

B. The “State of Palestine” does not fulfill the Montevideo Criteria because it lacks a discernable population.

10. The second Montevideo Criteria is inherently connected to the first; the absence of a defined territory, coupled with the express understanding that the creation of a state and the determination of its territory could only occur through negotiation contingent upon the agreement of both Israel and the PLO, means that there is no discernible permanent population over which a purported “State of Palestine” has control.¹⁸ As with the first Montevideo Criteria, the existence of a permanent population is a *political* issue that Israel and the PLO expressly agreed to resolve through a *political* mechanism – negotiations. It is not appropriate for this criminal Court to substitute its judgment for that of the parties.

C. The “State of Palestine” does not fulfill the Montevideo Criteria because it lacks a government in total control of its territory.

11. The third Montevideo Criteria, a government in total control of its territory, is not met by the so-called “State of Palestine” for several reasons. First and foremost, there simply is no single government in total control of its purported territory, as the Prosecutor herself admits.¹⁹
12. While certain areas of Judea and Samaria are, pursuant to the provisions of the Oslo Accords, subject to the limited administration of the Fatah-controlled Palestinian Authority (“PA”), since 2007, the Gaza Strip has been under the effective control of Hamas.
13. On 8 October 1997, Hamas was designated as a Foreign Terrorist Organization by the United States Department of State under section 219 of the Immigration and Nationality Act. This designation prohibits the provision of “material support or resources” to Hamas. Hamas is designated as a terrorist organization by, *inter alia*,

boundaries), dictates that the State of Israel inherit the boundaries of the Mandate of Palestine as they existed in May 1948.

¹⁸ Fixing and adjusting borders (whether by ‘land swaps’ or by other means) necessarily suggests a Palestinian population that is neither fixed nor permanent. The suggestion that the “Palestinian” population should be based purely on Arab ethnicity, to the exclusion of all Jews (including those who hold legitimate titles to land in the claimed “State of Palestine” and whose families were forced by the Jordanians/Egyptians armies to leave the area in 1948), is entirely inconceivable. Such a State, predicated on racist principles, would in and of itself be morally offensive and contradictory to the goals of the international community. Yet that is precisely the state that the Palestinian Authority clearly intends to form: one that is racially cleansed of all Jews. *See, e.g.*, <https://palwatch.org/page/15137>. That is the (purported) state that the Prosecutor’s Request endorses.

¹⁹ Prosecutor’s Request, para. 5.

countries as diverse as the United States of America, Canada, Japan, Paraguay and Israel. The European Union has also designated Hamas (in addition to several Palestinian groups) as a terrorist organization.²⁰ A terrorist organization lacks the authority to ‘govern’ anyone. Accordingly, it is inconceivable that the International *Criminal* Court would legitimize terrorism by affording Hamas any form of recognition, even implicit, as a government or an entity with the moral or legal authority to govern. Legitimizing Hamas would seriously compromise and prejudice the ICC’s own legitimacy and credibility.

14. As set forth more fully below, the PA wields *limited* control over an area that comprises less than 40% of Judea and Samaria, subject to the outcome of the permanent status negotiations, as agreed in the 1995 Interim Agreement (Oslo II). In the remaining area of Judea and Samaria, the PA has no territorial jurisdiction whatsoever. Stated differently, there is no sovereign government in total control of its territory.
15. As agreed by the PLO and Israel in the Oslo Accords, neither the PA nor Hamas hold any control or jurisdiction whatsoever over Jerusalem.
16. Sovereignty “is supreme authority, which on the international plane means not legal authority over all other states but rather legal authority which is not in law dependent on any other earthly authority”.²¹ The bilateral agreements that established the PA expressly state that Israel maintains all residual powers and responsibilities not delegated to the PA. Therefore, the PA’s authority to govern is dependent on and derivative – *not* co-equal – to Israel’s. Consequently, the PA cannot claim to be a sovereign government in total control of its territory, and is subject to the outcome of the permanent status negotiations which have yet to be concluded.²²
17. Moreover, the PA’s administrative powers fall far short of sovereign authority. The Interim Agreement expressly provided that “Israel shall continue to carry the responsibility for defense against external threats...as well as the responsibility for

²⁰ See <https://eur-lex.europa.eu/legal-content/en/TXT/HTML/?uri=CELEX:32019D1341&from=en>.

²¹ Robert Jennings and Arthur Watts, *Oppenheimer’s International Law: Peace*, Vol. 1, pg. 122 (9th ed. 2009).

²² In fact, the PA acknowledges that it is not a sovereign government in total control of its territory: “[t]he administrative powers accorded to the PA by the Interim Agreements are much more limited than the powers of a government.” Memorandum entitled “Implications of Change in de facto Control in Gaza” from the Negotiations Support Unit to Dr. Saeb Erekat (19 June 2007), available at: <http://www.ajtransparency.com/en/projects/thepalestinepapers/20121822587187346.html>.

overall security of Israelis and Settlements...and will have all powers to take the steps necessary to meet this responsibility”.²³ In accordance with the Interim Agreement which, it bears repeating, was *agreed to* by the PLO, the PA lacks full control over many of the other key attributes of sovereignty, such as criminal jurisdiction, tax collection, airspace, and even jurisdiction over Israelis. Clearly, the Interim Agreement did not contemplate the immediate creation of a sovereign Palestinian government in total control of its territory. Palestinian statehood was – and remains – a political aspiration, not a legal fact, and remains subject to a bilateral negotiation process to determine the permanent status of the territory.

D. The “State of Palestine” does not fulfill the Montevideo Criteria because it lacks the capacity to engage in foreign relations.

18. The “State of Palestine” also fails to meet the fourth Montevideo Criteria, the capacity to engage in foreign relations, since it lacks all other elements of statehood that would allow it to do so. The lack of a unified government exerting control over the entirety of its claimed territory prevents the reliable or effective exercise of foreign relations. The net result of the Interim Agreement was the creation of a PA with limited administrative powers, not the creation of a sovereign state with the capacity to engage in foreign relations.²⁴

E. Conclusion

19. The so-called “State of Palestine” does not meet the Montevideo Criteria for definition of a “State” such as to render the exercise of jurisdiction appropriate, especially in light of the explicit acknowledgment by the parties to the Oslo Accords that the permanent status of the territories – whether as a sovereign state or part of a federation or confederation – was an issue that the PLO agreed to negotiate at a later date, in the permanent status negotiations, which have not yet been concluded.
20. A State that does not exist is not capable of delegating sovereign jurisdictional competencies (since it does not possess them) to the ICC. The Prosecutor’s attempt to

²³ Interim Agreement, Art. XII(1).

²⁴ Non-governmental organizations, transnational agencies and national administrative bodies can all be said to engage in some form of ‘foreign relations’. However, without a sovereign government to give meaning to and effectuate the consequences of those foreign relations, those relations carry no weight. In other words, the exercise of foreign relations is meaningless outside the context of a sovereign state. Hamas, for example, can agree to purchase weapons from Iran. That agreement is not an exercise in foreign relations. It is an exercise in terrorism.

exercise jurisdiction in this manner is a violation of States' rights of sovereignty. See Section III, *infra*.

21. Moreover, the Court's acceptance of jurisdiction would improperly infringe on the parties' express agreement to politically negotiate the contours and conditions precedent necessary for Palestine to fulfill the Montevideo Criteria and become a sovereign state. The issue of Palestinian statehood is reserved to the parties to that negotiation, and is therefore a nonjusticiable political question.

II. General Assembly Resolutions Are Not Dispositive Of The Law Or The Facts In This Case

22. The Prosecutor explicitly acknowledges that "Palestine does not have full control over the Occupied Palestinian Territory"; the "West Bank and Gaza are occupied and East Jerusalem has been annexed by Israel"; and the "Palestinian Authority does not govern Gaza".²⁵ She further admits that "the territory of Palestine appears to be in dispute between those States most directly concerned - Israel and Palestine" and that "the question of Palestine's Statehood under international law does not appear to have been definitely resolved".²⁶
23. Yet, strangely, the Prosecutor has dismissed these fatal legal and factual obstacles to the exercise of jurisdiction. Instead, determined to wade into the most legally and factually complex and intractable political dispute of the past 100 years, the Prosecutor asks the Court to "rule on jurisdiction" (or, more correctly, recognise that the ICC may exercise jurisdiction) in the "Situation of Palestine". Specifically, the Prosecutor seeks a ruling under article 19(3) "to confirm that the scope of the Court's territorial jurisdiction in Palestine comprises the West Bank, including East Jerusalem, and Gaza."²⁷ She states it is "necessary" that her investigation rest "on the soundest legal foundation".²⁸
24. Contrary to her assertion, however, the Prosecutor has not built her case on a strong, unassailable legal or factual foundation. Rather, she has decided to proceed on an invented theory lacking any legal precedent. Namely, that the Court should disregard the plain meaning of the term "State" under international law and in the Rome Statute,

²⁵ Prosecutor's Request at para. 5.

²⁶ *Id.* at paras. 35, 5.

²⁷ *Id.* at para. 18.

²⁸ *Id.* at para. 20.

ignore the fact that “Palestine” does not meet the Montevideo Criteria, and instead exercise jurisdiction in the “Situation of Palestine” because the “international community has recognised the right of the Palestinian people to self-determination and to an independent and sovereign State.”²⁹

25. In place of sound and binding legal instruments, the Prosecutor has chosen to advance this fringe theory on the basis of highly selective, misleading, and/or one-sided sources. These include non-binding, politically-generated General Assembly resolutions that have absolutely no legal basis and represent nothing more than the political consensus of the automatic majority of states voting for them.
26. The Prosecutor explains that in crafting her theory, she “has relied on the views of the international community as expressed primarily by the UN General Assembly”. She claims that these “pronouncements are significant because the General Assembly bears ‘permanent responsibility’ for the resolution of the question of Palestine³⁰ and is the UN’s chief deliberative body where all member States have an equal vote”.³¹ The Prosecutor relies on these resolutions to support many of her legal and factual propositions including: the existence of a Palestinian state; the current territorial scope of that state; the legal status of that territory including whether it is occupied; the authorization of Rome Statute membership; and the nature and extent of legal injury suffered. This reliance is wholly misplaced. Nothing in these resolutions supports the Prosecutor’s novel legal proposition that the purported injury to self-determination rights can substitute for the threshold requirement of the existence of a State, mandated by the Rome Statute.

A. General Assembly resolutions are not binding law, nor do they establish “matters of fact”.

²⁹ *Id.*, at para. 219.

³⁰ The Prosecutor is misleading on this point. The resolutions cited “[r]eaffirm[] the permanent responsibility of the United Nations with regard to the question of Palestine”. They do not say that the General Assembly specifically is entrusted with this responsibility. Nevertheless, whether the General Assembly proclaims itself as having such responsibility is legally irrelevant. Even if the General Assembly did have “permanent responsibility”, such status has no bearing as to whether the information contained in the resolutions the Prosecutor relies upon is accurate as a legal or factual matter. Therefore, each resolution and the contents therein must be evaluated individually. It is also important to note that several of the resolutions cited by the Prosecutor do not reflect considered wording or renewed assessment of facts on the ground. Instead, they appear to be cut and pasted from previous resolutions.

³¹ Prosecutor’s Request at para. 11 (emphasis added).

27. The UN Charter makes clear that the General Assembly “may make *recommendations*” to UN Member States or to the Security Council.³² Apart from budgetary matters and establishing subsidiary organs, the General Assembly “has no legal power that affects the outside world. When it makes recommendations, these are indeed recommendations and not legally binding decisions”.³³ As international Jurist Stephen Schwebel has commented, General Assembly resolutions are not “binding on the States Members of the United Nations or binding in international law at large. It could hardly be otherwise”.³⁴ He adds that “not a phrase of the Charter suggests that [the General Assembly] is empowered to enact or alter international law”.³⁵
28. Nevertheless, the Prosecutor improperly asserts unproven legal claims as fact on the basis of political statements made by the General Assembly.
29. The General Assembly frequently employs legal rhetoric in its resolutions, but this does not turn such language into uncontroverted fact. For instance, while the General Assembly routinely refers to territory located across the 1949 Armistice lines as “Occupied” by Israel, this is merely a moniker and does not reflect specific findings of any binding legal process or judicial body. By the same token, the term “Palestinian territory” is no less a moniker inasmuch as there has never been any binding or authoritative international declaration, resolution, agreement or determination as to the fact that the territory is Palestinian. The fact that the expression “occupied Palestinian territory” has become political *lingua franca* in General Assembly resolutions and in statements by international personalities, including those of the Prosecutor herself, does not render it to be an authoritative or accepted and binding legal term and, as such, should not be a factor in the Court’s considerations.
30. In another example, the Prosecutor claims that Resolution 67/19 “reaffirm[ed] the right of the Palestinian people to self-determination and to independence in their State

³² UN Charter Chapter IV. See <https://www.un.org/en/sections/un-charter/un-charter-full-text/>. (Emphasis added).

³³ Regional Academy of the UN, “Revitalization of the General Assembly by reforming its procedures”, 2016 at 6. http://www.ra-un.org/uploads/4/7/5/4/47544571/revitalizing_the_un_general_assembly_final_draft.pdf

³⁴ Stephen M. Schwebel, “The Effect of Resolutions of the U.N. General Assembly on Customary International Law”, 73 Am. J. Int’l Law 301 (1979). Schwebel also rejects the notion praised by the Prosecutor that General Assembly resolutions have more force because of “one country one vote”. He, in fact, explains that the Assembly is actually “unrepresentative” because so many of the represented governments “are themselves not representative of their peoples”.

³⁵ *Id.*

of Palestine on the Palestinian territory occupied since 1967”.³⁶ This resolution is aspirational in nature and did not grant Palestinians statehood status, nor could it as the General Assembly does not have the power to establish states. In fact, many of the Member states supporting the resolution clarified that their vote *did not constitute the recognition* of an existing Palestinian state.³⁷ Notably, **Italy said its vote was explicitly conditioned on Palestinian promises that “Palestine” would not use such a vote to join the ICC.**³⁸ Since the Court is now forced to consider this case, such Palestinian promises were clearly hollow.

31. The Prosecutor cites to Resolution 43/177 as “[a]ffirming the need to enable the Palestinian people to exercise their sovereignty over their territory occupied since 1967” based on the supposed 31 July 1988 Jordanian relinquishing “of its claim to the West Bank” and its recognizing “the right of the Palestinian people to secede from the territory and to create an independent State”.³⁹ Nevertheless, the Prosecutor herself openly acknowledges that Jordan “occupied the West Bank, including East Jerusalem from the 1949 Armistice Agreements until the 1967 war”.⁴⁰ Under the Prosecutor’s own theory, therefore, Jordan had no sovereign rights that it was able to assign to the PLO.⁴¹ She does not explain why Arab occupation of Judea and Samaria and eastern Jerusalem conferred Jordan with assignable sovereign rights over the territory, while according to her, the exact same legal status confers no rights to Israel.
32. The Prosecutor also misleadingly cites several resolutions that include a reference to the “need for respect for and preservation of the territorial unity, contiguity and integrity of all the Occupied Palestinian Territory, including East Jerusalem”.⁴² These

³⁶ Prosecutor’s Request, para 12.

³⁷ See, e.g., statements of Denmark, Switzerland, Finland, and Belgium, available at: <https://unispal.un.org/DPA/DPR/unispal.nsf/0/C05528251EA6B4BD85257AE5005271B0>.

³⁸ “We took that decision in the light of the information we received from President Abbas on the constructive approach he intends to take after this vote. I refer in particular to his readiness to resume direct negotiations without preconditions and to refrain from seeking membership in other specialized agencies in the current circumstances, or pursuing the possibility of the jurisdiction of the International Criminal Court. With regard to the latter, Italy would not accept instrumental actions intended to question Israel’s inalienable right to defend itself.” <https://unispal.un.org/DPA/DPR/unispal.nsf/0/C05528251EA6B4BD85257AE5005271B0>.

³⁹ See Prosecutor’s Request, at paras. 60-61

⁴⁰ *Id.* at para. 60.

⁴¹ Shmuel Berkowitz, “The Status of Jerusalem in International and Israeli Law,” Jerusalem Center for Public Affairs, 2018, at 45, 50, available at https://jcpa.org/pdf/berkowitz_jerusalem_web_covers.pdf.

⁴² Prosecutor’s Request, at para. 12, n19. The relevant paragraph for the cited resolutions states: “stresses the need for the removal of checkpoints and other obstructions to the movement of persons and goods throughout

statements were *not* made in the context of defining the existing territory of a Palestinian state, as the Prosecutor implies. Rather, this phrase is used in the context of removing obstacles to the movement of goods and people for humanitarian purposes. In any event, on its face, this phrase is nonsensical as Gaza is located many dozens of kilometers from Judea and Samaria and eastern Jerusalem, and has never been “contiguous” with these areas at any point in history.

33. Similarly, the Prosecutor cites Resolution 3092 (and Security Council Resolution 446) referring to the applicability of Geneva Conventions in “Arab territories occupied by Israel since 1967”. Yet, while these resolutions express an opinion on the applicability of the Geneva Conventions in certain areas, they say nothing about the territorial scope of an extant Palestinian state.⁴³
34. Above all, the resolutions cited by the Prosecutor consistently and explicitly recognize that the two sides need to negotiate final status issues, including borders.⁴⁴ In other words, the scope of such territory has yet to be defined.

B. General Assembly resolutions are the product of a manifestly political and institutionally biased body.

35. The Prosecutor’s claims that the Court should accept General Assembly resolutions as a “matter of fact” because they reflect the “views of the international community” (a term without legal relevance and undefined by the Prosecutor).⁴⁵ Contrary to the Prosecutor’s assertion, General Assembly resolutions are the product of a manifestly

the Occupied Palestinian Territory, including East Jerusalem, and the need for respect and preservation of the territorial unity, contiguity and integrity of all of the Occupied Palestinian Territory, including East Jerusalem”.

⁴³ Moreover, in Resolution 446, the US, UK, and Norway abstained, <http://unscr.com/en/resolutions/446>, while the vote for Resolution 3092 was 105-4-20 (yes-no-abstain).

⁴⁴ For example, Resolution 73/19 stresses “the urgent need” to “restore a political horizon for advancing and accelerating meaningful negotiations aimed at the achievement of a peace agreement”; Resolution 71/23 “achieving a just, lasting and comprehensive settlement . . . is imperative”; “promote meaningful negotiations”; Resolution 43/177 affirms “the urgent need to achieve a just and comprehensive settlement in the Middle East”. Even Resolution 67/19, often cited by the Prosecutor, calls for “the resumption and acceleration of negotiations...that resolve[] all outstanding core issues,” implicitly recognizing that a “State of Palestine” does not exist, and can only exist as part of “negotiations within the Middle East peace process”.

⁴⁵ The Prosecutor extensively refers to the term “international community” but does not define its meaning or legal relevance. Because she bases a significant part of her brief on resolutions and publications of the General Assembly and its subsidiary bodies, she must not consider Israel and the United States, among others, to be part of the “international community”, as these countries consistently reject the one-sided resolutions issued by the General Assembly. In addition, many other members of the “international community” manifestly disagree with the Prosecutor and her effort to open an investigation in this situation, including Australia, Uganda, Germany, Hungary, Brazil, Austria, the Czech Republic, and Canada.

political body exhibiting long-standing institutional biases. In relying on these statements, the Prosecutor ignores the following realities:

36. Since the 1960s, the General Assembly has been heavily dominated by three overlapping blocs of countries - the Organization for Islamic Cooperation (“OIC”, 56 countries),⁴⁶ the Non-Aligned Movement (“NAM”), and the Group of 77 (“G-77”, originally 77, today, a group of 135 developing countries).⁴⁷ During the Cold War, the NAM grew to more than 100 countries and could “guarantee” the success or failure of any General Assembly resolution.⁴⁸ By 1971, the Group of 77 constituted two-thirds of the Assembly’s membership.⁴⁹ As a result, this group constitutes an automatic majority and can pass any vote at the General Assembly.⁵⁰ In addition, during the Cold War, the Soviet Union also exercised considerable influence in driving the agenda and debate at the General Assembly.⁵¹ Members of the Soviet bloc pressured the other political blocs such as the NAM and the Group of 77, while also disrupting or obstructing consensus positions within regional groups.⁵² This influence impacted the number and wording of politically biased resolutions adopted by this UN body.⁵³
37. The debate process at the General Assembly is often contentious and politically divided. The highest percentage of contested votes involves issues related to the Middle East.⁵⁴ Votes on these resolutions frequently have many “no” votes and abstentions.
38. Contrary to the Prosecutor’s assertion, just because a resolution was adopted does not mean it is indicative of international will - just that the vote was unable to overcome

⁴⁶ A majority of the members of the OIC do not recognize the existence of Israel or have severed diplomatic relations. It is ironic that these countries, half of whom are not members of the Court, and often use the UN as a cover for their own violations of human rights and humanitarian law, presume to instruct the Court to accept jurisdiction in this case. In addition, according to the NGO Freedom House, a majority of the countries in these blocs are classified as “not free” or only “partly free”. [https://freedomhouse.org/explore-the-map?type=fiw&year=2020&status\[not-free\]=not-free&status\[partly-free\]=partly-free&status\[free\]=free](https://freedomhouse.org/explore-the-map?type=fiw&year=2020&status[not-free]=not-free&status[partly-free]=partly-free&status[free]=free). It is unclear why the predominant views of such countries should carry more weight than other countries simply because they are more numerous.

⁴⁷ <https://unchronicle.un.org/article/voice-majority-group-77s-role-un-general-assembly>

⁴⁸ Report to Congress on Voting Practices in the United Nations US Department of State 1985 at 8.

⁴⁹ The Oxford Handbook of International Organizations Edited by Jacob Katz Cogan, Ian Hurd, and Ian Johnstone Oxford 2016.

⁵⁰ Daniel Patrick Moynihan, “The United States in Opposition,” *Commentary Magazine*, March 1975; Daniel Patrick Moynihan, *A Dangerous Place* (Berkley 1978).

⁵¹ Report to Congress on Voting Practices in the United Nations US Department of State 1985, pg. 8.

⁵² *Id.* at 9.

⁵³ Moynihan, *A Dangerous Place*, *supra*.

⁵⁴ See, Cogan, et. al., *Handbook of International Organizations*.

the dominance of the Soviet bloc, the NAM, the G-77, and the OIC.⁵⁵ In fact, “explicit criticism of a country by name” does not reflect any legal or factual truth but rather reflects the “act of powerful blocs against countries unable to defend themselves in the UN context”.⁵⁶

39. In addition, just because a country votes for a particular resolution does not mean it agrees with every aspect of the resolution or that other considerations motivated its vote. Votes may be acquired through “horse trading”.⁵⁷ For instance, during the debate on Resolution 67/19, many of the countries did not believe “Palestine” legally constituted a state, but voted for the resolution in order to show their support for continued negotiations with Israel on the permanent status and settlement of this dispute.⁵⁸
40. The Prosecutor appears to be advancing the proposition that jurisdiction should be established in this case because some members of the automatic majority and politically-biased General Assembly would like that to be so. But this is not a legal argument.⁵⁹ For instance, if a vast majority of the General Assembly voted that the Earth was flat, such a vote would not make it true as a *matter of fact*,⁶⁰ or as a matter of law. So, too, a resolution expressing frustration regarding the terms of or compliance with a treaty would not invalidate that agreement. In other words, majority

⁵⁵ Many of the resolutions cited by the Prosecutor were extremely divided. For example, Resolution 2535 was 48 in favor, 22 no, and 47 abstentions. Resolution 3237 was 95 in favor, 17 against, 19 abstentions, and 7 absences. Resolution 3236 was even more divided with 89 yes, 8 no, 37 abstain, and 4 absent. <https://www.un.org/unispal/document/auto-insert-198975/>. The no votes and abstentions represented a broad cross-section of geographically diverse countries, large and small, including Austria, Australia, Bolivia, Botswana, Brazil, Burma, Chad, Colombia, the Gambia, Uganda, the US, and Venezuela.

See <https://digitallibrary.un.org/record/657494?ln=en>.

⁵⁶ Report to Congress on Voting Practices in the United Nations US Department of State 1985, at 9.

⁵⁷ Report to Congress on Voting Practices in the United Nations US Department of State 1985 at 20.

See also, Daniel Patrick Moynihan, *A Dangerous Place* (Berkley 1978); Regional Academy on the United Nations, *Revitalizing the General Assembly by Reforming its Procedures*, 2016 (“One representative makes the remark that certain topics may be ‘pet projects’ for a limited number of countries. Other countries do not try to bar the implementation of resolutions on these topics, but “may not feel attached to their implementation.”), http://www.ra-un.org/uploads/4/7/5/4/47544571/revitalizing_the_un_general_assembly_final_draft.pdf.

⁵⁸ <https://unispal.un.org/UNISPAL.NSF/0/19862D03C564FA2C85257ACB004EE69B>.

⁵⁹ As Judge Schewebel has noted “if the principle of the sovereign equality of states has meaning, it must mean that the minority is as entitled publicly to state and to press for its views as the fashionable majority”. 73 AJIL at 309.

⁶⁰ As former Israeli ambassador to the UN, Abba Eban, famously quipped about politicized UNGA voting, “If Algeria introduced a resolution declaring that the earth was flat and that Israel had flattened it, it would pass by a vote of 164 to 13 with 26 abstentions”.

views as expressed in General Assembly resolutions (or other UN resolutions) are irrelevant to establishing facts as a legal matter.

41. It is also impossible to assess the validity of General Assembly resolutions without mentioning the body's obsession with, and hostility and bias towards, Israel.⁶¹ Any resolution relating to Israel passed by the General Assembly must therefore be viewed through this lens. Since Israel's admission to the UN, the OIC and Arab League, working in conjunction with the Soviet Union, promoted diplomatic boycotts of Israel in UN frameworks;⁶² in the 1970s and again in 1982, they tried to have Israel replaced by the PLO,⁶³ and until 2000, Israel was barred from being a member of any regional group - the primary way in which business is conducted at the General Assembly.⁶⁴ Many of the General Assembly debates underpinning the resolutions relied upon by the Prosecutor are poisoned by antisemitic bile.⁶⁵ By erasing this essential history, either by design or lack of knowledge, the Prosecutor has demonstrated the weakness of basing her case on General Assembly resolutions.
42. The General Assembly has issued more resolutions targeting Israel than the rest of the world combined.⁶⁶ For example, between 1973-78, the Assembly passed more than 80

⁶¹ As former US Ambassador Jeanne Kirkpatrick has noted, the UN campaign against Israel is "comprehensive, intense, incessant and vicious". Juliana Geran Pilon, "The United Nations' Campaign Against Israel," Heritage Foundation, June 1983, at 2.

⁶² In addition, as noted by legal scholar Robert Barnidge, even after 1967, this attitude did not change: "[i]t was not a question of the Arab world being willing to accommodate a Jewish State with territorial adjustments; the Arabs remained opposed, as they always had been to a Jewish State of any kind." Robert P. Barnidge, Jr., *Self Determination, Statehood, and the Law of Negotiation: The Case of Palestine*. (Oxford: Hart Publishing 2016) at 69. The NAM was similarly hostile. In October 1964, Egyptian President Nassar hosted the annual NAM summit conference and secured a declaration branding Jewish self-determination as a form of "racism". *Id.* at 66. By 1973, the NAM Conference went so far as calling for the eradication of Zionism itself, called for a full boycott of Israel, and demanded the blocking of Jewish immigration to anywhere in the territory of Mandated Palestine west of the Jordan River. *Id.* at 78.

⁶³ Moynihan, at 172; See also, Report to Congress on Voting Practices in the United Nations US Department of State 1986, at 39, (Kuwait tried to block Israel's credentials to the General Assembly), available at <https://books.google.co.il/books?id=cTxvF8OhWmUC&pg=SA111-PA34&lpg=SA111-PA34&dq=report+to+congress+on+voting+practices+1984&source=bl&ots=YPsdWFpJoX&sig=ACfU3U3IKBcojWq7-yK5BS5AIuiFgo9qeA&hl=en&sa=X&ved=2ahUKEwjN3-bc1pToAhVpRBUIHQEIAJ4Q6AEwBHoECAoQAQ#v=onepage&q=guarantee&f=false>.

⁶⁴ Opinion of Sir Robert Jennings, QC 4 November 1999, available at <https://mfa.gov.il/MFA/InternatlOrgs/Issues/Pages/Opinion%20regarding%20the%20Exclusion%20of%20Israel%20from%20the.aspx>; https://books.google.co.il/books/about/The_Treatment_of_Israel_by_the_United_Na.html?id=xAauJ84AalAC&redir_esc=y.

⁶⁵ At a December 1980 debate for instance, Jordan's ambassador "accused the Jewish 'people's cabal, which controls and manipulates and exploits the rest of humanity by controlling the money and wealth of the world.'" <https://www.heritage.org/report/the-united-nations-campaign-against-israel>.

⁶⁶ Mitchell Bard, "The UN relationship with Israel," Jewish Virtual Library, available at:

anti-Israel resolutions.⁶⁷ In 1982, this number reached 44 alone.⁶⁸ This pattern continues to this day. In 2019, there were 18 resolutions against Israel, 2 against Russia, and 1 each against the US, North Korea, Iran, Myanmar, and Syria.⁶⁹ As noted by a US official, “each year the UN General Assembly adopts a number of resolutions related to the situation in the Middle East. These perennial resolutions – some of whose very titles are evidence of their lack of balance – do nothing to advance the search for a just, lasting, and comprehensive peace in the region”.⁷⁰

43. In one notable case, the Prosecutor favorably relies on Resolution 3236 as an example of the “views of the international community”. She does not mention that following its passage, Yassar Arafat reportedly described to a Lebanese newspaper the genocidal intent of this resolution, “compris[ing] the liquidation of Zionist existence”.⁷¹ She also ignores the fact that countries like the UK rejected Resolution 3236, because, by granting observer status to the PLO, responsible for shocking acts of terrorism, the resolution “brings into question the nature of the UN as it has hitherto been accepted”.⁷² If Arafat’s sentiments reflect the “views of the international community”, besides common decency, these sentiments are completely at odds with the object and purpose of the UN Charter, and of course, the Rome Statute.
44. Furthermore, the Prosecutor selectively chooses some lines from a few General Assembly resolutions to place exclusive blame on Israel for the lack of Palestinian sovereignty. These resolutions erase Jewish self-determination and other legal rights relating to the territory; they exclude the history of Arab and Palestinian rejectionism in negotiating a solution to the conflict; and they routinely and deliberately ignore Palestinian terrorism (including airline hijackings, the 1972 Munich Olympics massacre, and suicide bombings) and other factors as to why the conflict persists. The

<https://www.jewishvirtuallibrary.org/the-u-n-israel-relationship>.

⁶⁷ Juliana Geran Pilon, “The United Nations’ Campaign Against Israel,” Heritage Foundation, June 1983, at 3-4.

⁶⁸ *Id.*

⁶⁹ Statistics provided by UN Watch, <https://unwatch.org/2019-un-general-assembly-resolutions-singling-out-israel-texts-votes-analysis/>.

⁷⁰ C. David Welch, Testimony Before the House International Relations Committee, July 1999, available at https://1997-2001.state.gov/policy_remarks/1999/990714_welch_un-israel.html.

⁷¹ Juliana Geran Pilon, “The United Nations’ Campaign Against Israel,” Heritage Foundation, June 1983, at 5. To this day, the PA relies on 3236 as justification for terror against Israel: <https://palwatch.org/page/15361>; <https://palwatch.org/page/14986>; <https://palwatch.org/page/14859>; <https://palwatch.org/page/13842>; <https://palwatch.org/home/search?q=3236>.

⁷² Remarks of UK representative, 22 November 1974, A/PV.2296, available at <https://unispal.un.org/DPA/DPR/unispal.nsf/0/7219F7FE733B856485256236005A4700>.

Prosecutor also fails to mention that many of these resolutions insist on negotiations between the parties to determine borders of two states. These facts are missing from the Prosecutor's brief, yet are directly relevant to the validity of her argument.

C. The Prosecutor's reliance upon resolutions and publications of other UN bodies is misplaced.

45. Reliance by the Prosecutor on the resolutions and publications of other UN bodies is similarly flawed. For example, under the UN Charter, only Security Council resolutions adopted under Chapter VII are legally binding.⁷³ Regardless, the Prosecutor **cites no such resolutions** to support her fringe theory for jurisdiction. In addition, the resolutions she relies upon do not support her contentions. For instance, she relies on Resolutions 298, 242, 338, and 399 to support the claim that Jerusalem is part of Palestinian territory, but none of these resolutions claim that Jerusalem is the territory of a "State of Palestine", nor that Jerusalem was ever under Palestinian sovereignty, and none of them were adopted under Chapter VII of the UN Charter.
46. Reliance on resolutions and publications of the Human Rights Council, a subsidiary body of the General Assembly, is even more questionable. Obsession and politicization directed towards Israel destroyed the Commission on Human Rights, the Council's predecessor entity, and is even more pronounced with the Council.⁷⁴ Israel is still the only country with its own permanent agenda item.⁷⁵ During the first 9 years of the HRC's existence, the Council passed 61 resolutions against Israel versus 56 against the rest of the world combined.⁷⁶ During that same period, 7 out of 17 Special

⁷³ See, e.g. Chapter VII of the UN Charter; Malcolm N. Shaw, *International Law*, (Cambridge 2d ed. 1986) at 557.

⁷⁴ In 2005, Annan noted "We have reached a point at which the commission's declining credibility has cast a shadow on the reputation of the United Nations system as a whole . . . and undermined by the politicisation of its sessions and the selectivity of its work."

<https://webcache.googleusercontent.com/search?q=cache:Z15Xga5du0QJ:https://www.scotsman.com/news/world/annan-admits-un-is-failing-to-prevent-human-rights-abuses-1-706943+&cd=8&hl=en&ct=clnk&gl=il>

⁷⁵ "Mr. Ban voiced disappointment at the Council decision to single out Israel as the only specific regional item on its agenda, "given the range and scope of allegations of human rights violations throughout the world." <https://unwatch.org/report-in-9-years-existence-unhrc-condemned-israel-more-times-than-rest-of-world-combined/>. Koffi Annan remarked "There are surely other situations, beside the one in the Middle East, which would merit scrutiny at a special session," <https://www.worldjewishcongress.org/en/news/annan-chides-un-human-rights-council-over-israel-focus>

⁷⁶ UN Watch, <https://unwatch.org/report-in-9-years-existence-unhrc-condemned-israel-more-times-than-rest-of-world-combined/>

Sessions were directed at Israel. Syria was next at 4.⁷⁷ European Union countries refuse to take part in Item 7 debates and the United States left the Council in 2018 over the extreme anti-Israel bias.⁷⁸ In 2014, human rights expert Christine Cerna remarked, “impartiality is not a requirement sought by the Council for the appointment of experts when it comes to Israel”.⁷⁹

47. In her one-sided historical narrative of the Arab-Israeli conflict, the Prosecutor relies primarily (62 citations) on an anonymous report⁸⁰ published by the Committee on the Exercise of the Inalienable Rights of the Palestinian People⁸¹ (“CEIRPP”). Professor Julius Stone noted multiple distortions and outright lies in this publication, and remarked that it was “highly improper” for CEIRPP “to commission, publish, and disseminate, as views of the organization itself, partisan theorizing in support of one side.”⁸² The Prosecutor also neglects to inform that CEIRPP (Resolution 3376) was established alongside the notorious “Zionism is racism” Resolution 3379 (adopted in 1975 but repealed in 1991).⁸³ Due to the politicized nature of the Committee and its founding concurrent with the auspices of an antisemitic resolution, many countries

⁷⁷ <https://unwatch.org/report-in-9-years-existence-unhrc-condemned-israel-more-times-than-rest-of-world-combined/>

⁷⁸ <https://www.jpost.com/Israel-News/Politics-And-Diplomacy/Western-nations-boycott-UNHRCs-Agenda-Item-7-debate-in-which-countries-discuss-Israel-457907>. In 2019, Austria, Australia, Denmark and the UK voted no to all Council resolutions on Israel to protest the extreme anti-Israel bias. <https://www.jpost.com/Israel-News/Denmark-Austria-UK-Australia-to-oppose-anti-Israel-resolutions-at-UNHRC-584215>. The UN Special Rapporteur on freedom of religion and belief has also remarked that parts of the UN are antisemitic, singling out Item 7 as a “problem” and that this antisemitism undermines work at the UN as a whole. <https://www.uscifr.gov/uscifr-events/uscifr-hearing-global-efforts-counter-anti-semitism> (beginning at 30:10).

⁷⁹ Cerna’s full comment: “In my view Israel has a unique status in the UN Human Rights Council. Impartiality is not a requirement sought by the Council for the appointment of experts when it comes to Israel. I was selected as the consensus candidate of the Consultative Committee for the post of UN Special Rapporteur on the Occupied Palestinian Territories earlier this year, but the Organization of Islamic Cooperation and the League of Arab States both officially opposed me, which killed my candidacy. They opposed me for ‘lack of expertise,’ although my entire professional life has been involved with human rights, but because I had never said anything pro-Palestinian and consequently was not known to be ‘partial’ enough to win their support. The candidate that they officially supported was considered to be partial in their favor. No other special procedures mandate is similarly biased. At the end of the day, neither I nor the OIC candidate was appointed, but the Indonesian diplomat, Makarim Wibisono, who was appointed, was considered sufficiently ‘pro-Palestinian’ to be acceptable to the OIC. Consequently, I don’t think Bill Schabas could have been selected to lead the ‘independent’ inquiry if he hadn’t made the comments he had made about Netanyahu.” <https://www.ejiltalk.org/after-gaza-2014-schabas/>

⁸⁰ Origins and Evolution of the Palestine Problem. No authors are listed, nor the names of the individuals involved in drafting the publication.

⁸¹ Juliana Geran Pilon, “The United Nations’ Campaign Against Israel,” Heritage Foundation, June 1983, at 5.

⁸² Julius Stone, *Israel and Palestine: Assault on the Law of Nations* (Johns Hopkins Univ. Press 1981) at 6.

⁸³ Although the resolution was repealed, CEIRPP and many other UN agencies continue to promote the antisemitic “Zionism is racism” canard.

have refused to take part as members of this committee and have refused to fund this agency.⁸⁴ In 2020, Ukraine resigned from this Committee, citing inherent bias.⁸⁵

D. Conclusion

48. The UN resolutions and publications cited by the Prosecutor are, legally speaking, insignificant. They are not binding, set no precedent, and have no preclusive effect. They do not carry the force of law. The Prosecutor chooses a few resolutions and publications, while ignoring contradictory evidence (see Section III). Reliance on General Assembly and other UN resolutions cannot be used as a shortcut or as a means to circumvent the need to present a solid, legally-based case, and engage in the requisite and appropriate legal analysis.
49. Nothing in the resolutions cited by the Prosecutor supports her invented theory that alleged self-determination violations can allow the OTP to circumvent the binding requirement of statehood in the Rome Statute. If anything, these resolutions repeatedly stress that the two sides need to negotiate a solution to the conflict, including territorial issues, without interference. In other words, even the resolutions she relies upon weigh against her arguments and the Court's competence to intervene in this complex dispute.
50. Nothing in the UN resolutions cited by the Prosecutor gives legal effect to some entity referred to as a "State of Palestine," or gives this Court jurisdiction over the so-called "Situation in Palestine".

⁸⁴ The majority of members do not have diplomatic relations with Israel and reject its existence. <https://www.un.org/unispa/committee/membership/>.

The Anti-Defamation League has documented that CEIRPP "is an anachronistic forum for bias against Israel and the most disturbing manifestation of institutional prejudice against the Jewish State within the U.N.," "35 Years of Demonizing Israel, July 2009, at 3, <https://www.adl.org/sites/default/files/documents/israel-international/un-international-organizations/c/CEIRPP-FINAL-REPORT-2009.pdf> In addition to CEIRPP, she heavily leans on non-credible reports and pronouncements from anti-Israel figures and countries appointed to inherently biased mandates, such as the Special Rapporteur on the Palestinian Territories and the Special Committee for the Investigation of Israeli Practices. (para. 91) The Special Committee Reports cited by the Prosecutor were authored by countries with no or highly volatile diplomatic relations with Israel (e.g. Malaysia, Sri Lanka, Senegal). It is also important to note that the reports produced by these procedures are not drafted on the basis of vigorous methodology or credible fact-finding. A department of a few OHCHR staffers in Geneva author most of these reports based upon unverified claims presented by a non-pluralistic group of highly political non-governmental organizations. Based on multiple conversations with OHCHR officials and the Institute for NGO Research, the staffers who draft these reports have no independent verification capability. See, e.g., Gerald Steinberg and Anne Herzberg (eds), *Filling in the Blanks: Documenting Missing Dimensions in UN and NGO Investigations of the Gaza Conflict* (2015).

⁸⁵ JNS, "Ukraine leaves UN Committee on Palestinians," January 8, 2020, <https://www.israelhayom.com/2020/01/08/ukraine-leaves-un-committee-on-palestinians/>.

III. The Oslo Accords Did Not Give The So-called “State of Palestine” Sovereignty Or Jurisdiction Over Territory It Now Claims To Control

51. Contrary to the OTP's opinion that "limitations to the PA's jurisdiction agreed upon in the Oslo Accords cannot and should not bar the exercise of the Court's jurisdiction in Palestine pursuant to article 12(2) (a)" (para 189), the first time in history that any part of Gaza, Judea or Samaria came under any form of Palestinian administration was in the context of the Oslo Accords.
52. The Accords, which are binding between Israel and the PLO, provided the legal and *political* framework for the creation of a Palestinian entity that would be charged with the limited powers and jurisdiction needed for the self-rule of the **Palestinians** resident in those areas. In order to implement the Accords, countersigned by the United States of America, Russia, the European Union, Egypt and Norway (and endorsed by the UN), legislation was required both in Israel,⁸⁶ on the one hand, and in Gaza, Judea and Samaria, on the other.
53. The area of Judea and Samaria, referred to by Jordan as the “West Bank” following the 1949 Armistice Agreement signed between Israel and Jordan, had never before been regarded as a separate territory. In order to ensure that the Armistice lines were **never seen as a “border”**⁸⁷ between Israel and Jordan,⁸⁸ the 1949 agreement stipulated, at the demand of Jordan: “No provision of this Agreement shall in any way

⁸⁶ The laws passed in Israel to adopt the Oslo Accords included, *inter alia*, the Law Implementing the Agreement Regarding the Gaza Strip and Jericho (Financial arrangements and sundry provisions) (Legislative amendments), 5755-1994 (https://www.nevo.co.il/law_html/law01/177_002.htm); the Law Implementing the Agreement Regarding the Gaza Strip and Jericho (Jurisdiction and other provisions) (Legislative amendments), 5755-1994 (https://fs.knesset.gov.il/13/law/13_lsr_211074.PDF); the Law Implementing the Preparatory Transfer of Powers to the Palestinian Authority (Legislative amendments and other provisions), 5755-1995 (https://www.nevo.co.il/law_html/law01/176_001.htm); the Law Implementing the Interim Agreement Regarding the West Bank and the Gaza Strip (Jurisdiction and other provisions) (Legislative amendments), 5756-1996 (https://www.nevo.co.il/law_html/law01/177_006.htm#Seif5);

⁸⁷ While Israel accepted the 1947 Partition Plan set out in UNGA resolution 181 (<https://mfa.gov.il/mfa/aboutisrael/maps/pages/1947%20un%20partition%20plan.aspx>) the surrounding Arab countries rejected the decision, opting instead to launch military operations to destroy the nascent Jewish State. The demand of the Arab countries that the Armistice Lines never be seen as borders was based on two main arguments. Firstly, the recognition of the Armistice Lines as “borders” would assume that on the other side of the “border” was a legitimate country. The Arab countries rejected the legitimacy of Israel and would not agree to the creation of a “border” between Israel and its neighbours. Secondly, during the Arab initiated hostilities, Israel gained territory as compared to the Partition Plan. Accordingly, since the Arab countries were not willing to accept Israel's legitimacy, they were similarly not willing to accept any other entity that controlled an area larger than the map attached to the Partition Plan. For further details see: <https://web.archive.org/web/20110822123836/http://unispal.un.org/unispal.nsf/b792301807650d6685256cef0073cb80/93037e3b939746de8525610200567883?OpenDocument>.

⁸⁸ As part of the hostilities, Jordan illegally occupied Judea and Samaria in 1948 and controlled the area until 1967.

prejudice the rights, claims and positions of either Party hereto in the ultimate peaceful settlement of the Palestine question, the provisions of this Agreement being dictated exclusively by military considerations”.⁸⁹ The agreement further stipulated that “[the Armistice Demarcation] Lines defined in articles V and VI of this Agreement are agreed upon by the Parties without prejudice to future territorial settlements or boundary lines or to claims of either Party relating thereto”.⁹⁰

54. While the Armistice lines were not a “border” in any way, from 1949 to 1967, the lines *de facto* separated Israel and Jordan.⁹¹
55. The line separating the Gaza Strip from Israel was first demarked in the Armistice Agreement signed between Israel and Egypt in 1949.⁹²
56. Article IV(3) of the agreement specifically provided:
 “It is emphasised that it is **not the purpose of this Agreement to establish, to recognise, to strengthen, or to weaken or nullify, in any way, any territorial, custodial or other rights**, claims or interests which may be asserted by either Party in the area of Palestine... The provisions of this Agreement are dictated exclusively by military considerations and are valid only for the period of the Armistice”.⁹³
57. Article V(2) added: “The Armistice Demarcation Line is **not to be construed in any sense as a political or territorial boundary**, and is delineated without prejudice to rights, claims and positions of either Party to the Armistice as regards ultimate settlement of the Palestine question”.⁹⁴
58. While the armistice line could in no way have been regarded as a “border”, from 1949 to 1967, the line *de facto* separated Israel and Egypt.

⁸⁹ <https://mfa.gov.il/mfa/foreignpolicy/mfadocuments/yearbook1/pages/israel-jordan%20armistice%20agreement.aspx>, Art II(2).

⁹⁰ *Id.*, Art. VI(9).

⁹¹ While now claiming Judea and Samaria as the “State of Palestine”, article 24 of the original 1965 Palestine Liberation organization [Herein: “PLO”] Charter provided that “This Organization [The PLO] does not exercise any territorial sovereignty over the West Bank in the Hashemite Kingdom of Jordan, on the Gaza Strip or in the Himmah Area”.

⁹² Egypt seized control of the Gaza Strip in 1948 and held it until 1967.

⁹³ <https://mfa.gov.il/mfa/foreignpolicy/mfadocuments/yearbook1/pages/israel-egypt%20armistice%20agreement.aspx>. (Emphasis added).

⁹⁴ *Id.* (Emphasis added).

59. Having taken control of Gaza (from Egypt) and Judea and Samaria (from Jordan) in June 1967, the Israeli Defence Force (“IDF”) issued “Ordinances” in which it declared that the areas had come under Israeli Military control.⁹⁵
60. Since 1967, only seven Ordinances have been issued. Two were issued immediately.⁹⁶ Two of the remaining Ordinances were issued pursuant to the first of the Oslo Accords,⁹⁷ and focused on the creation of the PA and the initial transfer of powers and authority to the newly created entity that had *limited* powers and jurisdiction in the Gaza Strip and the area of the city of Jericho only.
61. Two other Ordinances⁹⁸ focused on the implementation of the additional agreements, creating a wider framework for the operation of the PA and the transfer of some powers from Israel to the PA.
62. Most importantly, Ordinance No. 7 implemented the Interim Agreement, which established the division of Judea and Samaria into areas ‘A’, ‘B’, and ‘C’.
63. Two of the provisions of the Oslo Accords and the implementing ordinances are of particular relevance to the issue before the Court.

⁹⁵ Israel’s military control of the Gaza Strip ended in September 2005. Israeli citizens, who had been resident in the Gaza Strip since 1967, were removed from their homes. The last IDF soldiers left the Gaza Strip on September 11, 2005. The IDF Military Commander declared the end of the Military rule of the Gaza Strip, by Ordinance, on September 12, 2005. While most the following provisions of the Oslo Accords applied, *mutatis mutandis*, to both the Gaza Strip and Judea and Samaria, since the end of the IDF control of the Gaza Strip, it should be seen as a *sui generis* area, similar in nature to area ‘A’, as defined in the Interim Agreement. Accordingly, the Gaza Strip will not be separately addressed in this submission, unless specifically noted.

⁹⁶ Ordinance No. 1 declared that the area was now under IDF Military control

(<https://www.idf.il/media/30901/%D7%A7%D7%9E%D7%A6%D7%9D-%D7%97%D7%95%D7%91%D7%A8%D7%AA-1-%D7%A6%D7%95-1-8-07061967-09061967.pdf>);

Ordinance No. 2 provided that the law that had previously been applied in the area, would remain in force, in as much as it did not contradict new legislation.

(<https://www.idf.il/media/30901/%D7%A7%D7%9E%D7%A6%D7%9D-%D7%97%D7%95%D7%91%D7%A8%D7%AA-1-%D7%A6%D7%95-1-8-07061967-09061967.pdf>).

⁹⁷ Ordinances No. 4 (<https://www.idf.il/media/57080/%D7%97%D7%95%D7%91%D7%A8%D7%AA-154.pdf>) (May 15, 1994)) and 5 (<https://www.idf.il/media/57084/%D7%97%D7%95%D7%91%D7%A8%D7%AA-159.pdf>) (Dec. 11, 1994)) focused on the implementation of the first agreements, including, inter alia, the Agreement on the Gaza Strip and the Jericho Area, May 4, 1994

(<https://mfa.gov.il/mfa/foreignpolicy/peace/guide/pages/agreement%20on%20gaza%20strip%20and%20jericho%20area.aspx>) and two additional agreements of Aug. 29, 1994

(<https://mfa.gov.il/MFA/ForeignPolicy/Peace/Guide/Pages/Agreement%20on%20Preparatory%20Transfer%20of%20Powers%20and%20Re.aspx>) and Oct. 9 1994.

⁹⁸ No. 6 (<https://www.idf.il/media/57087/%D7%97%D7%95%D7%91%D7%A8%D7%AA-164.pdf>) (Sept. 10, 1995) implemented the Aug. 27, 1995 Agreement) And No. 7

(<https://www.idf.il/media/57087/%D7%97%D7%95%D7%91%D7%A8%D7%AA-164.pdf>) (Nov. 23, 1995).

64. As addressed more fully below, the first such provision relates to the subjects that were **left to be resolved only in future negotiations** between the parties. The second relates to the extent of the **criminal jurisdiction** granted to the Palestinian entity.

A. The Oslo Accords left numerous issues to be resolved only in future negotiations.

65. The Oslo Accords were reached between Israel and the PLO, which acted as the representative of the Palestinians.

66. It is an unequivocal and undisputed fact that the Oslo Accords left a number of issues, including Jerusalem, settlements, Palestinian refugees, and borders, subject to further negotiations between the parties. This binding agreement between the parties was reflected in repeated provisions of the Oslo Accords.⁹⁹ The negotiations **between the parties** on these subjects have not yet been concluded.

67. The Accords were drafted in an "open-ended" language by the parties in that they left open the fundamental question of what the permanent status agreement between the Israelis and Palestinians would eventually entail. Any external dictation (such as this Court's acceptance of jurisdiction on the basis of the existence of a putative "State of Palestine") that purports to finalize a position regarding any of the subjects left open between the parties, would fundamentally undermine the very basis of the Oslo Accords and would prejudice the outcome of such negotiations. Notably, the term "two state solution" coined by former President George W. Bush *has never been agreed upon by the parties* and, in effect, assumes that there will be a Palestinian state. This prejudices the outcome of the negotiations on the permanent status, which could lead to a federation, confederation, condominium, extended autonomy, or any other permutation.

68. Accordingly, since the subject of "borders" was left open in the Oslo Accords, the Prosecutor's attempt to determine the territorial scope of a purported "State of Palestine" based on the 1949 armistice lines is erroneous for a number of reasons.

69. As shown previously, the 1949 Armistice agreements specifically stipulated that the armistice lines were merely a product of "military considerations" that would in no

⁹⁹ Declaration of Principles, Article V; Interim Agreement - Article XVII (2)(a).

way prejudice “territorial settlements or boundary lines or to claims of either Party relating thereto.”¹⁰⁰

70. The predication of the Prosecutor to adopt the armistice lines as the “border” of the “State of Palestine” entirely undermines the most fundamental of premises of the armistice agreements and contradicts their express language.
71. Noting the language and status of these areas, the Oslo Accords specifically left the legal status of the entire territory, including the subject of “borders”, unresolved between the parties.¹⁰¹ Concluding that the armistice lines demarcate the “border” (or even the existence) of the “State of Palestine” entirely undermines the most fundamental of premises of the Oslo Accords.
72. Furthermore, the Prosecutor’s apparent attempt to recognize a “State of Palestine” within the area demarked by the armistice lines is rejected by the Palestinian leadership as too limiting.
73. The largest faction of the PLO is Fatah, now headed (since the death of Yasser Arafat in 2004), by PA Chairman Mahmoud Abbas. Fatah has controlled the PA since the latter was established.
74. Fatah does not accept the limitation of the “State of Palestine” to Gaza, Judea and Samaria. Rather, Fatah sees the “State of Palestine” as the entire area from the Jordan River in the east, to the Mediterranean Sea, in the west, from Lebanon in the north, to the Red Sea in the south, as “Palestine”. In other words, in Fatah’s view, the State of Israel does not exist. The PA and Fatah repeatedly state this position.
75. PA schoolbooks contain scores of maps showing the “State of Palestine”, and erasing Israel’s existence.¹⁰² Teachers in PA schools teach the children to anticipate the end of

¹⁰⁰ As noted above, the language of the Armistice Agreement between Israel and Egypt was more explicit and provided that the demarcation line should “not to be construed in any sense as a political or territorial boundary.”

¹⁰¹ This agreement also reflected the fundamental provision of UN Security Council resolution 242, which did not, and does not, require Israel to withdraw from **all of the** territories it took control of in 1967. For further discussion of this point, see: <https://jcpa.org/article/ten-false-assumptions-regarding-israel/>; <https://jcpa.org/wp-content/uploads/2012/02/Kiyum-lapidoth.pdf>; https://jcpa.org/requirements-for-defensible-borders/security_council_resolution_242/.

¹⁰² https://www.impact-se.org/wp-content/uploads/Rejection-of-Peace_-Changes-from-Pre-2016-PA-Curricula.pdf.

- Israel and the “liberation of Palestine”.¹⁰³ PA and Fatah leaders repeatedly confirm this position.¹⁰⁴
76. Other members of the PLO, such as the Popular Front for the Liberation of Palestine (“PFLP”),¹⁰⁵ similarly reject the notion that a “State of Palestine” is limited to the area the Prosecutor randomly attributed it.¹⁰⁶
77. Since the PA/PLO/Fatah wields powers (and the authority granted to the Palestinian entity by the Oslo Accords), these clear statements of the actual Palestinian leadership entirely reject and undermine any demarcation of the “State of Palestine” that does not erase Israel.
78. Moreover, while the Prosecutor chooses to ignore reality and discount the ostensible legitimacy of the Hamas rule over the Gaza Strip, the fact is that in the last elections held in the PA in 2006, **Hamas (a terrorist organization) won the outright majority of votes.**¹⁰⁷
79. Hamas, similar to Fatah, rejects the notion that the “State of Palestine” is limited to the areas demarked by the 1949 armistice lines.
80. Article 11 of the Charter of Hamas, clearly states the territory from the “[Jordan] River to the [Mediterranean] Sea” is “Islamic Waqf consecrated for future Moslem generations until Judgement Day”.¹⁰⁸
81. Given the provisions of the 1949 armistice agreements and the Oslo Accords, and in light of the repeatedly-stated positions of the Palestinian leadership - as opposed to the politically driven machinations of the Prosecutor - it is clear that no factual or legal basis exists upon which the Court could possibly rely in order to demark, unilaterally, the “borders”¹⁰⁹ of the non-existent “State of Palestine”.

¹⁰³ <https://palwatch.org/page/15697>.

¹⁰⁴ See, e.g., :<https://palwatch.org/page/17487>; <https://palwatch.org/page/17393>; <https://palwatch.org/page/17010>; <https://palwatch.org/page/16738>; <https://palwatch.org/page/16291>; <https://palwatch.org/page/15660>; <https://palwatch.org/page/15639>; <https://palwatch.org/page/15404>; <https://palwatch.org/page/14966>. For additional examples, see <https://palwatch.org/analysis/21-203--21>

¹⁰⁵ The PFLP is designated as a terrorist organization by the United States and Canada, among other countries.

¹⁰⁶ See <https://english.pflp.ps/2014/02/17/abu-ahmad-fouad-the-pflp-entirely-rejects-negotiations-and-political-settlement/>.

¹⁰⁷ <https://www.elections.ps/Portals/0/pdf/The%20final%20distribution%20of%20PLC%20seats.pdf> – In these elections, Hamas ran under the name “Change and Reform”.

¹⁰⁸ The Covenant of the Islamic Resistance Movement, 18 Aug. 1988, available at: https://avalon.law.yale.edu/20th_century/hamas.asp.

¹⁰⁹ Even Security Council Resolution 2334, refrained from demarcating the “borders” of the “State of Palestine”. On the one hand, when the Council thought it appropriate to use the language “border” it did so specifically. As

82. These statements by the Palestinian leadership are fundamental to the subject before the Court. On the one hand, they reflect the contradictory positions espoused by the Palestinian leadership before different forums regarding the territorial expanse of the “State of Palestine”. On the other, they reflect the true intentions of the Palestinian leadership to destroy Israel. The Prosecutor’s blindness to these statements further demonstrates the unfounded nature of the Prosecutor’s demarcation of the “State of Palestine” based on the Armistice lines.

B. The extent of the PA’s criminal jurisdiction does not include Israelis or Israel.

83. Since the Court functions on the basis of criminal jurisdiction delegated by a State party, it is essential to evaluate what criminal jurisdiction, if any, the Palestinian entity holds regarding Israelis.
84. One of the most fundamental provisions of all of the Oslo Accords and the implementing ordinances was that the PA would be devoid of any criminal jurisdiction regarding Israelis.
85. This principle was first set down in Article VIII of the Declaration of Principles, which provided that “Israel will continue to carry the responsibility for defending against external threats, as well as the responsibility for overall security of Israelis for the purpose of safeguarding their internal security and public order”.
86. The Agreed Minutes¹¹⁰ to the Declaration of Principles on the Interim Self-government arrangements added:
- “1. Jurisdiction of the Council will cover West Bank and Gaza Strip territory, except for issues that will be negotiated in the permanent status negotiations: Jerusalem, settlements, military locations, and Israelis.
2. The Council's jurisdiction will apply with regard to the agreed powers, responsibilities, spheres and authorities transferred to it”.
87. Articles V(1)(b) and (c) of the Agreement on the Gaza Strip and the Jericho Area continued:

the resolution stated: “Reiterating its vision of a region where two democratic States, Israel and Palestine, live side by side in peace within secure and recognized **borders**”. But when the “borders” were unclear the resolution reflected this reality: “Underlines that it will not recognize any changes to the 4 June 1967 **lines**, including with regard to Jerusalem, other than those agreed by the parties through negotiations”.

¹¹⁰ <https://mfa.gov.il/mfa/foreignpolicy/peace/guide/pages/declaration%20of%20principles.aspx>.

“The functional jurisdiction [of the PA] encompasses all powers and responsibilities as specified in this Agreement. This **jurisdiction does not include** foreign relations, internal security and public order of Settlements and the Military Installation Area and **Israelis**, and external security.

“The personal jurisdiction extends to **all persons** within the territorial jurisdiction referred to above, **except for Israelis**, unless otherwise provided in this Agreement”. (Emphasis added).

88. Article V(3)(a) further added: “Israel has authority over the Settlements, the Military Installation Area, Israelis, external security, internal security and public order of Settlements, the Military Installation Area and Israelis, and those agreed powers and responsibilities specified in this Agreement”.
89. Article VIII(1) added:
“In order to guarantee public order and internal security for the **Palestinians** of the Gaza Strip and the Jericho Area, the Palestinian Authority shall establish a strong police force, as set out in Article IX below. Israel shall **continue to carry the responsibility** for defense against external threats, including the responsibility for protecting the Egyptian border and the Jordanian line, and for defense against external threats from the sea and from the air, as well as the **responsibility for overall security of Israelis** and Settlements, for the purpose of safeguarding their internal security and public order, and will have all the powers to take the steps necessary to meet this responsibility”. (Emphasis added).
90. The Interim Agreement further clarified and entrenched the principle that the PA is **devoid of any criminal jurisdiction over Israelis**.
91. Article XVII(1)(a) of the Interim Agreement clearly provided the PA jurisdiction would not include “issues that will be negotiated in the permanent status negotiations: Jerusalem, settlements, specified military locations, Palestinian refugees, borders, foreign relations and **Israelis**”. (Emphasis added).
92. Paragraph (2)(c) added: “The territorial and functional jurisdiction of the Council will apply to all persons, **except for Israelis**, unless otherwise provided in this Agreement”. (Emphasis added).

93. Ensuring that this principle was **airtight**, Article I(2) of Annex IV of the Interim Agreement added further clarification: “Israel has **sole criminal jurisdiction** over the following offenses: a. offenses committed outside the Territory,¹¹¹ except for the offenses detailed in subparagraph 1. b above; and b. offenses committed in the Territory by Israelis”. (Emphasis added).
94. Article II(2)(c) added that, “The Palestinian authorities **shall not arrest Israelis** or place them in custody.” (Emphasis added).
95. The Oslo Accords also ensured that Israel would continue to hold most powers and jurisdiction in the **maritime area adjacent to the Gaza Strip**.¹¹²
96. Paragraph 6 of Ordinance No. 7 implemented the provisions of the Interim Agreement, providing that Israel would continue to hold all powers and jurisdictions regarding:
 - "1) The settlements and the Military installations.
 - 2) Area C
 - 3) **Israelis**
 - 4) Every issue related to the external security of the area, the security and the public order of the settlements and the Israeli military installations
 - 5) Security and public order in areas that are under Israeli security control
 - 6) Other powers and fields of responsibility that remain in the hands of the IDF OC in the area according to the Interim Agreement, including powers and fields of responsibility that were not transferred to the Council in this agreement".
 (Emphasis added).

¹¹¹ The term “territory” is defined in Article I(1)(a) as follows: “For the purposes of this Annex, “Territory” means West Bank territory except for Area C which, except for the Settlements and the military locations, will be gradually transferred to the Palestinian side in accordance with this Agreement, and Gaza Strip territory except for the Settlements and the Military Installation Area”.

¹¹² Article XIV(1)(b)(4) of the Interim Agreement provided that, “As part of Israel's responsibilities for safety and security within the three Maritime Activity Zones, Israel Navy vessels may sail throughout these zones, as necessary and without limitations, and may take any measures necessary against vessels suspected of being used for terrorist activities or for smuggling arms, ammunition, drugs, goods, or for any other illegal activity”.

This provision was a copy of Article XI of Annex I of the Agreement on the Gaza Strip and the Jericho Area. Article XIV(2)(g) further provided that “Boats belonging to Israelis are solely subject to the control, authority and jurisdiction of Israel and the Israel Navy”. These provisions were additional to other limitations, including size, travel speed, areas in which the PA registered boats could operate, the size of the PA Coastal Police (up to 10 boats) and the weapons they could carry. Similar provisions also appeared in Article XI of Annex I of the Agreement on the Gaza Strip and the Jericho Area. 1. In addition to the limitations on the PA, Article XIV(a)(iv) further made clear that the PA would have no jurisdiction to allow foreign vessels to approach the Gaza Strip closer than 12 nautical miles.

97. The Oslo Accords **did not**, in any way, shape or form grant the PA any **jurisdiction in Jerusalem**, as defined by the city's municipal borders.¹¹³ Moreover, pursuant to the Oslo Accords, all PA activity of a political or governmental nature in that area was specifically prohibited by Israeli law.¹¹⁴
98. The cumulative provisions of both the Oslo Accords and the implementing Ordinances leave no room for any speculation whatsoever. They are clear and unambiguous: the PA was never granted, at any stage, criminal jurisdiction over Israelis.¹¹⁵

C. Conclusion

99. At most, the Palestinian entity, as embodied by the PA, is purely a creation, *de facto* and *de jure*, of the Israeli government and the PLO pursuant to the Oslo Accords. The PA was established as an agreed-upon managing body to implement the Accords; the Prosecutor is now attempting (at the behest of the Palestinian leadership) to upgrade this managing body to the status of a sovereign state – something it was never intended to be. In fact, the special regime agreed upon by Israel and the PLO in the Oslo Accords constitutes a *lex specialis* that overrides any other legal regime, and in Article XXXI(8) of the Interim Agreement the parties specifically undertook not to change the status of the territory pending the outcome of the permanent status negotiations. The Court is respectfully requested to acknowledge this important and central point.
100. Consistent with this conclusion, the limited powers and jurisdiction that Israeli authorities delegated to the Palestinian entity **never included** any criminal jurisdiction whatsoever over Israelis.

¹¹³ Shortly after the Six Day War, Israel applied its civilian law to all of Jerusalem as demarcated in the order of Israel's government dated June 28, 1967 and subsequent decisions of Israel's Minister of the Interior. For further discussion of the borders of Jerusalem, see Israel Supreme Court decision H CJ 256/01 Rabakh et. al. v The Jerusalem Municipal Affairs Court et. al.

¹¹⁴ See Law Implementing the Interim Agreement Regarding the West Bank and the Gaza Strip (Limitation of Activities), 5755–1994 (https://www.nevo.co.il/law_html/law01/177_005.htm)

¹¹⁵ On this and other subjects pertinent to the deliberations of the Court, see “The International Criminal Court's Lack of Jurisdiction Over the So-Called ‘Situation in Palestine,’” State of Israel, Office of the Attorney General, 20 Dec. 2019, available at:

<https://www.justice.gov.il/Units/YeutzVehakika/InternationalLaw/News/Documents/The%20InternationalCriminalCourt%e2%80%99slackofjurisdictionoverthe%20so-called%e2%80%99situationinPalestine%e2%80%9d-Memorandum%20oftheAttorney%20General.pdf>

101. Accordingly, since the Palestinian entity was, is and will remain for the foreseeable future, **devoid of any criminal jurisdiction** over Israelis, it is clear that the Court cannot acquire any residual criminal jurisdiction.
102. As set forth more fully above, no “State of Palestine” presently exists that is capable of delegating sovereign jurisdictional competencies to the ICC. The Court’s acceptance of jurisdiction would improperly infringe on the parties’ express agreement in the Oslo Accords to politically negotiate the contours and conditions precedent necessary for Palestine to fulfill the Montevideo Criteria and become a sovereign state. The issue of Palestinian statehood is reserved to the parties to that negotiation, and is therefore a nonjusticiable political question.
103. Accordingly, the Court lacks jurisdiction with respect to the so-called “Situation in Palestine”, and the undersigned Organisations respectfully submit these Observations that the Court should deny the Prosecutor’s Request.

Respectfully submitted,



Gerard Filitti, on behalf of The Lawfare Project



Anne Herzberg, on behalf of The Institute for NGO Research



Maurice Hirsch, on behalf of Palestinian Media Watch



Ambassador Dore Gold, on behalf of The Jerusalem Center for Public Affairs

Dated this 16th day of March 2020
At New York, New York and Jerusalem, Israel

***ARTICLE: "PALESTINE, UTI POSSIDETIS JURIS, AND THE BORDERS OF
ISRAEL" BY ABRAHAM BELL & EUGENE KONTOROVICH***

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

No.: **ICC-01/18**
Date: **20 March 2020**

PRE-TRIAL CHAMBER I

Before: Judge Péter Kovács, Presiding Judge
Judge Marc Perrin de Brichambaut
Judge Reine Adélaïde Sophie Alapini-Gansou

SITUATION IN THE STATE OF PALESTINE

PUBLIC with PUBLIC ANNEXES A B and C

Corrigendum to “Submissions Pursuant to Rule 103 (The Israel Forever Foundation)”

Source: The Israel Forever Foundation

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

The Office of the Prosecutor

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Legal Representatives of the Victims

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States' Representatives

Amici Curiae

See Annex B

REGISTRY

Registrar

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I. Introduction

1. For the International Criminal Court to assert its authority “where clear jurisdictional parameters have not been met...is neither good law nor makes for responsible judicial action.”¹ The Prosecution’s Request invites this Chamber to make bad law and engage in irresponsible judicial action.
2. The questions in this case are simple:
 - May an entity which has not attained objective statehood under international law but has been recognised by a number of states become a party to the Rome Statute?
 - May such an entity then invoke the Statute’s provisions and the jurisdiction of the International Criminal Court to bind a non-party state, even where its written agreements with the non-party reflect it does not otherwise have any form of criminal jurisdiction over the non-party or its nationals?
 - May it then delegate jurisdiction to the Court over acts committed on territories which it does not currently govern as a matter of fact and control over which it and the non-party state have agreed to resolve through final status negotiations?
 - Must this Court accept that entity’s referral even if it set the terms of its referral so as to exclude specific criminal conduct by affiliated forces?
3. If the Court answers any of these questions in the negative, the clear parameters set forth in the Rome Statute hold that in the absence of a referral by the United Nations Security Council, this Court lacks jurisdiction to investigate the “Situation in Palestine.”²

II. Applicable Law

4. On 22 January 2020, the Prosecution filed the Request.³ The Request sought a ruling from this Chamber as to whether the Court has territorial jurisdiction in this situation and the scope of such jurisdiction (if any).⁴ On 20 February 2020, this Chamber granted The Israel Forever

¹ [Bensouda 2014](#).

² [Rome Statute](#), Art.12-13. *E.g.* [December 2019 PE report](#), paras.49,35. This Chamber invited observations by *amici curiae* as to the scope of the Court’s territorial jurisdiction in the situation in Palestine. [Order](#), para.15; see [Request](#), para.220. Consequently, while allegations in the Request may have been challenged by independent investigations, this brief focuses on the jurisdictional issues presently before the Chamber. See [HLMG Report](#).

³ [Request](#).

⁴ [Request](#), para.220.

Foundation's request to submit observations as *amicus curiae*, as well as requests from dozens of other organisations, states, and individuals.⁵

5. The Rome Statute sets out clear preconditions for the exercise of jurisdiction. In order for the Court to have jurisdiction, at least one of the following States must be a Party to the Statute or have accepted the jurisdiction of the Court with respect to allegedly criminal conduct:
 - The State on the territory of which the conduct in question occurred; or
 - The State of which the person accused of the crime is a national.⁶
6. Before commencing an investigation, the Prosecutor must determine that “information available to the Prosecutor provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed.”⁷ There is little precedent setting forth the clarity with which the Prosecutor must set out this information when making a request for a ruling on the Court's jurisdiction. In similar situations, where the Prosecutor seeks to have the Pre-Trial Chamber authorise an investigation in the Article 15 context, she must provide *inter alia* a reference to the crimes which she asserts there is a reasonable basis to believe have been or are being committed within the jurisdiction of the Court; a declaration with reasons that the listed crimes fall within the jurisdiction of the Court; and specific facts related to the location, timing, and persons involved in the crimes to be investigated.⁸
7. “The Court shall satisfy itself that it has jurisdiction” at all stages of a proceeding.⁹ In deciding a jurisdictional question, a Chamber must “attain a degree of certainty” that it has jurisdiction.¹⁰

III. Arguments

8. Initially, the Prosecution explicitly asserts it has identified a reasonable basis to proceed on only a small number of allegations that it asserts fall within the jurisdiction of the court:

⁵ [Decision](#), para.55.

⁶ [Rome Statute](#), Art.12. By contrast, obligations to cooperate with, for instance, the International Criminal Tribunal for Rwanda and the International Criminal Tribunal for the former Yugoslavia derived from the UN Charter's directive that all member states must “accept and carry out the decisions of the Security Council,” which had established those institutions. [U.N. Charter](#), Art.25.

⁷ [Rome Statute](#), Art.53(1).

⁸ [Regulations](#), Regulation 49(1)-(2). See [Afghanistan Decision](#), para.38.

⁹ [Rome Statute](#), Art.19(1).

¹⁰ [Bemba Decision](#), para.24.

- allegations of crimes by members of the Israeli Defence Forces during the 2014 Gaza conflict, which it notes are being addressed in domestic proceedings;¹¹
- allegations of crimes by Palestinian armed groups during the 2014 Gaza conflict;¹² and
- allegations of crimes committed in the context of Israeli settlement policy, specifically the alleged transfer of Israeli civilians into the West Bank since 13 June 2014.¹³

The Prosecutor opines that an investigation could extend to other allegations.¹⁴ However, she does not assert there is a reasonable basis to proceed with an investigation regarding any other specific allegations elsewhere in the Request. She can thus only show this Court has jurisdiction by showing it has jurisdiction over these allegations. To find jurisdiction on other facts would risk commencing an investigation without a demonstrated reasonable basis to proceed.

9. Therefore, if the Chamber grants the Prosecution's request to rule on jurisdiction, it would have to make at least one of two findings in order to determine the Court has jurisdiction to open an investigation:
 - The Court has jurisdiction over areas of the "West Bank" in which Israeli civilians have built homes since 13 June 2014 - specifically Area C, or over Palestinian-claimed areas of Jerusalem; or
 - The Court has jurisdiction over events in Gaza during the summer of 2014, before the PA submitted an accession to the Rome Statute.
10. The following observations are provided to assist the Chamber in evaluating these two questions and determining neither can be answered in the affirmative. They provide valuable legal context should the Chamber consider broader questions as to the current

¹¹ [Request](#), para.94.

¹² [Request](#), para.94.

¹³ [Request](#), para.95. The Prosecutor is aware Israeli settlement policy is the subject of domestic litigation. [Kay/Kern Art. 15 Communication](#). Her conclusion that resulting cases would nonetheless be admissible because global challenges to that policy have been dismissed under the political question doctrine is not clearly based in law. However, complementarity is not a jurisdictional issue and so this filing does not further address the matter.

¹⁴ [Request](#), paras.97,99.

legal status of the Palestinian territories, such as the status of Palestinian aspirations for statehood and how the borders of an eventual state would be defined.

11. Those issues aside, the Request is insufficient to justify a finding of jurisdiction as a matter of law if this Chamber finds, regardless of the current legal status of the PA:

- it cannot clearly establish it has jurisdiction over events which occurred before the PA submitted an instrument of accession to the Rome Statute;¹⁵ and
- it cannot clearly establish jurisdiction over events in Area C or Palestinian-claimed areas of Jerusalem.¹⁶

A. The Request fails to establish jurisdiction because it misstates the law and facts related to national self-determination in the territory at issue.¹⁷

12. International law has recognised for a century – since national self-determination first began to be given broad effect after World War I and with the dissolution of the Hapsburg and Ottoman Empires - that both Jews and Arabs have rights to national self-determination in the area then referred to as “Palestine” that now includes Jordan, Israel, and the territories administered by the Palestinian Authority.¹⁸

13. The League of Nations Mandate for Palestine (“Mandate”), for instance, recognised and incorporated “the historical connection of the Jewish people with Palestine and...the grounds for reconstituting their national home in that country” and held the Mandatory British power responsible, *inter alia*, for taking measures to “secure the establishment of the Jewish national home, as laid down in the preamble...and also for safeguarding the civil and religious rights of all the inhabitants of Palestine, irrespective of race or religion.”¹⁹ Other simultaneous Mandates effectuated the self-determination rights of Arab peoples on several different territories which, like Mandatory Palestine, had been formerly included in the Ottoman Empire.²⁰

¹⁵ See paras.72-74.

¹⁶ See paras.30-34, 38-39.

¹⁷ [Request](#), particularly para.187 and Section II.C.1.

¹⁸ See [Request](#), para.46 (citations omitted). At the time, neither Jordan nor Israel were terms in common diplomatic usage. Consequently, the “Palestine” referred to in post-World War I legal documents bears no resemblance to any description of Palestine today.

¹⁹ [Palestine Mandate](#), preamble; Art.2.

²⁰ *E.g.* [French Mandate](#); [British Mandatory Iraq](#).

14. The Mandate built on declarations and international treaties recognising Jewish rights to self-determination in the territory then referred to as Palestine. Critical examples include the British government's "Balfour Declaration"²¹, the Feisal-Weizmann agreement²² and the San Remo Conference.²³
15. Crucially, the Mandate identified and recognised pre-existing rights and connections – it did not grant new ones. While given short shrift in the Request, those rights continue to receive international recognition. For instance, Ahmed Shaheed - the UN's Special Rapporteur for Freedom of Religion and Belief – recently acknowledged Zionism (the support for a Jewish state in their ancestral homeland in Israel) is "the self-determination movement of the Jewish people."²⁴
16. In short, those *amici* who argue that Mandatory Palestine was a state²⁵ ignore that whatever its status, it was a territory designated under international law for the specific fulfillment of Jewish national self-determination.²⁶ As Malcolm Shaw has previously submitted, "to reinterpret [the Mandate] as simply statehood for the Arab population of the Palestinian mandate is deeply...flawed legally and historically."²⁷
17. The State of Israel, not the Palestinian Authority, fulfils the Mandate's guarantee of Jewish self-determination in the territory then referred to as Palestine. Indeed, it would be perverse to determine that the designation of a territory to fulfil a people's right to national self-determination in some way guaranteed the statehood of a later-arising entity in a portion of that territory in which members of that people are not allowed to travel and even selling

²¹ See [Balfour Declaration](#) ("His Majesty's Government view with favour the establishment in Palestine of a national home for the Jewish people, and will use their best endeavours to facilitate the achievement of this object, it being clearly understood that nothing shall be done which may prejudice the civil and religious rights of existing non-Jewish communities in Palestine or the rights and political status enjoyed by Jews in any other country").

²² [Faisal-Weizmann Agreement](#) (*inter alia* stating that the parties were "mindful of the racial kinship and ancient bonds existing between the Arabs and the Jewish people, and reali[s]ing that the surest means of working out the consummation of their natural aspirations is through the closest possible collaboration in the development of the Arab State and Palestine" (emphasis added) and held "[i]n the establishment of the Constitution and Administration of Palestine, all such measures shall be adopted as will afford the fullest guarantees for carrying into effect the British Government's Declaration of the 2nd of November, 1917" (i.e. the Balfour Declaration)).

²³ [San Remo Convention](#).

²⁴ [Shaheed Report](#), para.17. See [ADL](#).

²⁵ [Quigley brief](#), *passim*; [IADL application](#), para.3.2.4; [Bazian application](#), para.3.

²⁶ See paras.13-15.

²⁷ [Shaw Supplementary Opinion](#), para.18.

property to them is punishable by a life sentence in prison or the death penalty,²⁸ merely because of that later-arising entity's choice of nomenclature.

18. Subsequently, the Mandate was divided. Area within the territory originally designated for Jewish national self-determination which would become an Arab state, consistent with the treaty of Sevres, was separated out and eventually became the state of Jordan.²⁹ The UN Partition Plan additionally envisioned Arab self-determination in a portion of the remaining territory of Palestine and re-divided that between land designated for a Jewish state and land designated for a Palestinian Arab state.³⁰
19. Israel declared independence in 1948 and achieved broad diplomatic recognition, fulfilling the Mandate's guarantee of Jewish self-determination. No entity immediately declared independence in the territories set aside for an Arab state in Mandatory Palestine.³¹ As of 2004, ICJ Judge Elaraby wrote "[t]he independence of the Palestinian Arab State ha[d] not yet materialized."³²

B. The Request fails to establish jurisdiction because it incorrectly seeks to ignore the legal ramifications of the Oslo Accords.

20. First and foremost among the agreements intended to eventually achieve a Palestinian state, whose residents will live side-by-side and in peace with Israel on portions of the former Mandate territory, are the Oslo Accords. The Accords were concluded under international auspices and include several provisions which are central to the issue before the Chamber. The Request, however, attempts to deny them any legal consequence.³³

²⁸ *E.g.* [Daraghmeah \(2018\)](#); [Al Jazeera \(2018\)](#) ("the Ramallah High Court found the man guilty on Monday of violating a penal code from 1960 that bans the sale of land to a foreign country. This crime can result in capital punishment under Palestinian law, but President Mahmoud Abbas has never ratified a death sentence").

²⁹ [Jordan Treaty of Alliance, pp.143-175](#). See [Request](#), para.46 and fn.88.

³⁰ [Partition Resolution](#). The United Nations committee rejected an Arab league proposal which would have established a unitary state in which Jewish legislative representation was restricted by law, all Jewish immigration was prohibited, and Jews were unable to buy Arab-owned land. See [UNSCOP](#), Chap. IV, para.11.

³¹ Some of those territories were annexed by Jordan after the 1948 Arab-Israeli armed conflict. [U.S. 1954 Report](#), p.9; Crawford (2006), p.425 ("The remaining territory of pre-1948 Palestine was occupied by Jordan (the West Bank, East Jerusalem) and Egypt (the Gaza Strip). This occupation lasted until 1967, when, as a result of the Six Day War, Israel occupied those territories").

³² See [Separate Opinion of Judge Elaraby](#), p.251 (citations omitted). As one scholar has observed, Judge Elaraby's opinion "articulated Palestinian rights at their highest", that is, provided those rights their most expansive legal formulation. [Ash \(2009\)](#), p.196.

³³ [Request](#), paras.183-189.

21. The Prosecution’s revisionist attempt to dismiss the legal relevance of the Accords must fail. The Accords were applauded by the international community. From 1993-1996, the UN General Assembly passed annual resolutions entitled “The Middle East Peace Process”, which *inter alia* declared its full support for the Accords and called for a UN role in implementing them.³⁴ The next year, Israeli Prime Minister Yitzhak Rabin, PLO Chairman Yasser Arafat, and Israeli Minister of Foreign Affairs Shimon Peres received the Nobel Peace Prize for their roles in the Accords.³⁵

1. The Accords establish the possibility of Palestinian statehood as an outcome of bilateral peace negotiations

22. The Oslo Accords were framed on 9 September 1993 by an exchange of significant letters of recognition between PLO chairman Yasser Arafat and Israeli Prime Minister Yitzhak Rabin.³⁶ Days later, “the Government of the State of Israel and the PLO team” signed the Declaration of Principles on Interim Self-Government Arrangements (“Oslo I”).³⁷ On 4 May 1994, Israel and the PLO signed the Gaza-Jericho Agreement, which established the Palestinian Authority.³⁸ The Gaza-Jericho Agreement was incorporated into and superseded by the 1995 Oslo Interim Agreement (“Oslo II”).³⁹

23. The letters and agreements set forth a process towards “a permanent settlement” based on Security Council resolutions 242 (1967) and 338 (1973).⁴⁰ The agreements set forth the parties’ shared goal for the “Palestinian people in the West Bank and Gaza Strip” to govern themselves.⁴¹ Each transferred some powers to the Palestinian Authority, expressly noting that any powers not transferred would continue to be exercised by Israel.⁴² Both Oslo I and

³⁴ [UNGA Resolution 48/58 \(1993\)](#); [UNGA Resolution 49/88 \(1994\)](#); [UNGA Resolution 50/21 \(1995\)](#); [UNGA Resolution 51/29 \(1996\)](#).

³⁵ *E.g.* [Nobel Peace](#).

³⁶ [Letter from Yasser Arafat to Yitzhak Rabin](#); [Letter from Yitzhak Rabin to Yasser Arafat](#).

³⁷ [Oslo I](#), preamble.

³⁸ [Gaza-Jericho Agreement](#).

³⁹ [Oslo II](#).

⁴⁰ [Oslo I](#), Art.I; [Oslo II](#), preamble; [Letter from Yasser Arafat to Yitzhak Rabin](#); [Letter from Yitzhak Rabin to Yasser Arafat](#).

⁴¹ [Oslo I](#), Art.I; [Oslo II](#); [Gaza-Jericho Agreement](#).

⁴² [Oslo I](#), Art.VI.2. (immediately “education and culture, health, social welfare, direct taxation and tourism.”); [Oslo I](#), Art.VII.2 (indicating “executive authority, legislative authority . . . [and] independent Palestinian judicial organs” would be established through interim agreements); [Oslo II](#) (empowering the PLO to sign with States or international

II were circulated by representatives of permanent members of the Security Council who participated in their negotiation and became official documents of the General Assembly and Security Council.⁴³

24. Through these and other provisions, the Accords provided mutual recognition and the first functional exercise of Palestinian self-governance. However, they did not purport to establish a Palestinian state and reserved a variety of “final status issues” for further negotiations.⁴⁴ As Arafat wrote in his letter to Rabin, among other PLO commitments, “The PLO commits itself to the Middle East peace process, and to a peaceful resolution of the conflict between the two sides and declares that all outstanding issues relating to permanent status will be resolved through negotiations.”⁴⁵ As two pro-Palestinian scholars concluded, the plan endowed “the PA with a certain measure of internal autonomy, and some measure of external competence, but the Oslo understandings suggest that final status includes Palestinian statehood” and “such status must be negotiated with Israel.”⁴⁶
25. In response to a US-proffered plan to resolve permanent status issues earlier this year,⁴⁷ PA President Abbas raised the possibility that the PA would withdraw from the Accords.⁴⁸ This proposal reflects that the Accords have remained in place at all times relevant to the Request, continue to remain in force, and govern the existing disposition of authority in territories reserved for final status negotiations, among other issues.

2. The Accords limit the criminal jurisdiction available to the Palestinian Authority and consequently limit the jurisdiction it can delegate to this Court.

a. The Court’s jurisdiction is delegated by states party to the Rome Statute.

organisations only the following types of agreements: economic, foreign aid, regional development, cultural, scientific and educational.)

⁴³ [Oslo I](#); [Oslo II](#).

⁴⁴ [Oslo I](#), Art.V.3 (reserving for permanent status negotiations “Jerusalem, refugees, settlements, security arrangements, borders, relations and cooperation with other neighbours, and other issues of common interest”).

⁴⁵ [Letter from Yasser Arafat to Yitzhak Rabin](#).

⁴⁶ [Nagan-Haddad](#) (2012), p.375.

⁴⁷ [Peace to Prosperity: A Vision to Improve the Lives of the Palestinian and Israeli People](#).

⁴⁸ See [Times of Israel](#).

26. This Chamber's decision on jurisdiction in the Bangladesh situation reflects a thorough analysis of the Rome Statute's drafting history. The Chamber concluded:

... the drafters of the Statute intended to allow the Court to exercise its jurisdiction pursuant to article 12(2)(a) of the Statute in the same circumstances in which States Parties would be allowed to assert jurisdiction over such crimes under their legal systems, within the confines imposed by international law and the Statute.⁴⁹

In essence, the Court may acquire and exercise the territorial jurisdiction which its State Parties have.⁵⁰ This ensures that, as to non-parties, the treaty establishing the ICC does not grant a foreign entity jurisdiction over their citizens which did not previously exist.⁵¹ As one scholar has explained, this “preserves the principle that ICC jurisdiction is grounded in the sovereign consent of states”.⁵² The PCA has similarly held that a state “could not transfer more rights than she herself possessed.”⁵³

27. As set forth below, there is no rule of international law that the PA is objectively a state.⁵⁴ If this Court finds jurisdiction, the Rome Statute would impose obligations on a non-party state to recognise for the purposes of delegation to the ICC the jurisdiction over its citizens of an entity which it had not recognised and which had not attained objective statehood under international law. This would violate the VCLT'S fundamental principles.⁵⁵

b. The Accords preclude the PA from having or delegating jurisdiction over the allegations in the Request.

⁴⁹ [Bangladesh Decision](#), para.70.

⁵⁰ International law recognises other bases for jurisdiction. *E.g.* [Lotus](#). States cannot delegate jurisdiction to the ICC which derives from a basis other than the territory where the crime was committed or the nationality of the perpetrator because such delegation would require the Court to recognise as a basis for delegation state jurisdiction outside the jurisdictional prerequisites set forth in the Rome Statute.

⁵¹ [VCLT](#) Art.34 (“A treaty does not create either obligations or rights for a third state without its consent”). See [Newton \(2016\)](#), p.385 (for jurisdiction to be delegated to the ICC, “the State Party must itself possess jurisdictional authority at the time of the alleged offense. Otherwise, there is no tangible right that can result in jurisdiction...”)

⁵² [Newton \(2016\)](#), p.384. See [Luban et al.](#), p.727 (“whenever the referral or information comes from [a sources other than the Security Council], the situation or case must fall within the parameters of the personal and territorial scope of the jurisdiction to which the states consented in the Rome Statute or to which they consent later on an ad hoc basis”).

⁵³ [Islands of Palmas Case](#), p.838. Similarly, when one party to a treaty signs a subsequent treaty with other partners on the same subject matter but another party to the first treaty does not sign the subsequent treaty, between the parties to the first treaty “the treaty to which both states are parties governs their mutual rights and obligations.” [VCLT](#) Art.30(4)(b).

⁵⁴ See paras.40-58. Some scholars refer to the PA as a “quasi-state.” *E.g.* [Worster \(2011\)](#), p.1180.

⁵⁵ [VCLT](#) Art.34.

28. Under the Accords the PA has no criminal jurisdiction over Israeli citizens, as the Prosecutor acknowledges.⁵⁶ It cannot delegate jurisdiction it does not have and thus cannot give the Court jurisdiction to investigate or prosecute Israeli citizens.
29. The Prosecutor asserts the PA retains jurisdiction to prescribe conduct, even if it lacks jurisdiction to enforce its laws over Israeli citizens, and jurisdiction to prescribe is sufficient to justify delegation.⁵⁷ Initially, the Request provides no explanation of the evolution in the Prosecution's position from 2009, when it required that the question, "Does the PA have the capacity to try Israeli citizens?", be "convincingly answered in the affirmative" in order for the court to take jurisdiction.⁵⁸ Moreover, when a situation is delegated to the ICC individuals involved in the situation may be subject to both the substantive provisions of the Rome Statute and the Court's authority to enforce and/or request member states cooperate in enforcing its law. A delegating entity thus must have both jurisdiction to prescribe and jurisdiction to enforce for the Court's exercise of jurisdiction to be consistent with the VCLT.⁵⁹
30. Regardless, however, the PA never acquired prescriptive jurisdiction over Jerusalem or Area C. For instance, the Prosecution concedes that "In Area C (including the settlements), Israel **retained complete territorial jurisdiction but the Palestinian Council was to acquire functional jurisdiction over Palestinians**" [in the Palestinian territories] for certain purposes (emphasis added).⁶⁰ As reflected by the Request's use of the word "complete", Israel has both jurisdiction to prescribe and to enforce in Area C generally. Similarly, Oslo II sets Jerusalem generally (thus including East Jerusalem) outside the PA's jurisdiction pending final status negotiations.⁶¹

⁵⁶ [Request](#), para.183. See [Newton \(2016\)](#), p.411 ("the plain text of the Oslo Accords provide incontrovertible grounds for denying Palestinian sovereignty over Israeli nationals in the Occupied Territories of the West Bank and Gaza Strip...").

⁵⁷ [Request](#), para.184.

⁵⁸ [Al Haq Paper](#), para.22. As Shaw has explained, even affirmative answers to this and the other questions asked in 2009 would be insufficient to demonstrate statehood. [Shaw Supplementary Opinion](#), paras.48-50.

⁵⁹ See *infra* para.26.

⁶⁰ [Request](#), para.68. See [Newton \(2016\)](#), p.412 ("From the outset of the occupation, Israeli military authorities exercised full authority over the criminal system in the Occupied Territories...")

⁶¹ [Oslo II](#), Art. XVII.1(a). Unlike Area C, Israel does not apply the law of occupation in Jerusalem but claims the city as sovereign Israeli territory. [Policy Brief](#).

31. As the Request notes, Oslo II contains the parameters of the legislative authority that Israel transferred to the PA.⁶² Under Oslo II, Israel retained “the necessary legislative powers and responsibilities” over (a) areas outside the territorial jurisdiction of the Council, (b) issues that were not transferred to the Council and (c) Israelis.⁶³ Any legislative authority asserted by the PA beyond its jurisdiction or in conflict with other provisions of Oslo II “shall have no effect and shall be void *ab initio*.”⁶⁴
32. Oslo II reflected the parties’ agreement that the territorial jurisdiction of the PA would initially exclude Area C entirely.⁶⁵ It anticipated certain issues would be “gradually transferred to Palestinian jurisdiction” and others - including settlements, foreign relations and Israelis⁶⁶ - would be “negotiated in the permanent status negotiations.”⁶⁷ Oslo II limits the criminal jurisdiction of the PA to offenses committed by non-Israelis in the Territory, which is defined to exclude Area C.⁶⁸
33. No transfer⁶⁹ nor permanent status agreement have yet been achieved:⁷⁰ the Hebron Protocol and Wye River Memorandum, each signed by Israeli Prime Minister Netanyahu and PLO/PA Chairman Mahmoud Abbas,⁷¹ the current leaders of Israel and the PA respectively, were focused on security issues and did not transfer additional functional jurisdictional powers to the Palestinian Authority.⁷² Consequently, the PA has not obtained any additional legal authority over permanent status issues.

⁶² [Request](#), paras. 63,67,71. In many instances, the agreement refers to the Palestinian Council, but clarifies those responsibilities were to be exercised by the PA. [Oslo II](#), Art I.2 (“Pending the inauguration of the Council, the powers and responsibilities transferred to the Council shall be exercised by the Palestinian Authority established in accordance with the Gaza-Jericho Agreement, which shall also have all the rights, liabilities and obligations to be assumed by the Council in this regard. Accordingly, the term ‘Council’ throughout this Agreement shall, pending the inauguration of the Council, be construed as meaning the Palestinian Authority”).

⁶³ [Oslo II](#), Art. III.2; Art. XVII.4; Art. XVIII.2.

⁶⁴ [Oslo II](#), Art. XVIII.4(a).

⁶⁵ [Oslo II](#), Art. XVII.2(a).

⁶⁶ [Oslo II](#), Art. XVII.1(a).

⁶⁷ [Oslo II](#), Art. XVII.2(a).

⁶⁸ [Oslo II](#), Annex IV; Art I.1(a); Art. VII.5.

⁶⁹ The transfer of all “civil powers and responsibilities” were to “be coordinated through the CAC and implemented in accordance with the arrangements set out” in Annex III of Oslo II, “in a smooth, peaceful and orderly manner.” [Oslo II](#), Annex III, Art. III.2.

⁷⁰ As the UN notes, “Subsequent rounds of such negotiations held in 2000-2001, 2007-2008, and 2013-2014 were inconclusive.” [Key Issues at Stake](#).

⁷¹ Abbas heads the PA, Fatah and the PLO. See [ECFR](#).

⁷² See generally [Hebron Protocol](#), [Wye River Memorandum](#).

34. Ordinance No. 7, which implemented Oslo II, explicitly directs that Israeli authorities have *legislative* powers in the area – e.g., prescriptive jurisdiction:

6. A. The Israeli military commander in the region and any person appointed by him or acting on his behalf will continue to exercise the powers, responsibilities and duties including legislative, judicial and administrative powers relating to each of the following:

(1) the settlements and military sites;

(2) Area C...⁷³

The Prosecutor does not acknowledge Israeli legislative authority in Area C or Jerusalem. Her assertion that the PA has jurisdiction to prescribe conduct in Area C and East Jerusalem appears to be entirely based on her assertion that those are clearly defined Palestinian territory,⁷⁴ an assertion supported by neither law nor fact and indeed denied by the explicit language of the agreements cited above.⁷⁵

35. Even were this Chamber to accept the Prosecutor’s distinction between jurisdiction to prescribe and jurisdiction to enforce, the PA would be unable to delegate jurisdiction over conduct in Area C or Jerusalem since it has no jurisdiction to prescribe conduct there.⁷⁶

c. The object and purpose of the Rome Statute do not justify finding jurisdiction.

36. The Prosecutor asserts that the object and purpose of the Rome Statute militate in favour of jurisdiction, citing language in the Rome Statute seeking to “guarantee lasting respect

⁷³ [Ordinance 7](#), para.6.

⁷⁴ [Request](#), fn.582 (asserting that jurisdiction “depends on the objective status of the territory”).

⁷⁵ See paras.30-34.

⁷⁶ Assuming *arguendo* that the Accords are a special agreement as the Prosecutor asserts, limitations on such agreements do not alter this conclusion. The Accords effectuated Palestinian Arab self-determination, not negated it. The PA did not waive any peremptory right to prescribe conduct or enforce such prescriptions in disputed territories because it does not have legal title to those territories and international consensus reflects the final status of those territories should be resolved through bilateral negotiations. See paras.62-64. Finally, it is noted that the Geneva Convention obligation referred to by the Prosecutor is limited to allegations of ‘grave breaches’. [GCIV](#), Art.146. The allegations of transfer of civilian population into occupied territory are not a ‘grave breach’ of the 1949 Conventions and so Oslo would exclude jurisdiction over those allegations even if the Prosecutor’s argument were otherwise accepted. [GCIV](#), Art.147. E.g. [Rome Statute](#), Art.8(2) (distinguishing between alleged ‘grave breaches’ in Art.8(2)(a) and ‘other serious violations’ in Art.8(2)(b)); [Request](#), para.95 (referencing a subsection of Art.8(2)(b) as to these allegations).

for and the enforcement of international justice” and “that the most serious crimes of concern to the international community as a whole must not go unpunished.”⁷⁷ In a criminal court these goals cannot justify setting aside the clear legal limitations on the institution.

37. Simple analogies demonstrate this principle clearly. In the *Bangladesh* situation, the Prosecution requested jurisdiction only over the crime of deportation because that was the only crime over which the court had jurisdiction, allowing by implication impunity for mass atrocities including rape and murder if they were not committed with the intent to displace people across a national border because the Court simply lacked the legal authority to investigate those crimes.⁷⁸ Similarly, the goal of punishing “the most serious crimes” would not justify violating the obligation to disclose exculpatory material⁷⁹ even if that material might endanger a conviction, for instance by calling into question the credibility of a key witness at a stage of the proceedings where the Prosecution could no longer call other witnesses to prove the same point.

3. If this Court were to assess the boundaries of a hypothetical Palestinian state, the Accords would exclude the very areas referred to

38. As noted *supra*, the Accords reserve issues of “settlements” and “Jerusalem” for permanent status negotiations.⁸⁰ Resolution 67/19 notes these issues and “borders” as “outstanding core issues” which should be resolved through “negotiations”.⁸¹

39. Should this Court determine that it can assess the borders of a hypothetical Palestinian state, it should not include therein territories as to which Oslo allocates control to Israel and future control has been reserved for permanent status negotiations, including both Area

⁷⁷ [Request](#), para.180.

⁷⁸ [Bangladesh Request](#), *e.g.* paras.1,10 (seeking leave to investigate only deportation but noting evidence of mass rapes and murders, among other crimes). In its decision on the Bangladesh Request, this Chamber considered the Court might have jurisdiction over other crimes, but only if “an element... or part of such a crime is committed on the territory of a State Party”, referring to persecution through the underlying act of deportation and inhumane acts through arbitrary denial of the right to return to one’s country. [Bangladesh Decision](#), paras.74-77. In its decision granting the Prosecutor’s subsequent request to open an investigation in Bangladesh, this Chamber explicitly noted it did not have jurisdiction over “alleged murder, forcible transfer of population, imprisonment, torture, rape or persecution” which occurred entirely on the territory of Myanmar, though it considered those crimes might assist in satisfying the contextual elements of crimes against humanity for crimes committed in Bangladesh. [Bangladesh Investigation Decision](#), para.93.

⁷⁹ [Rome Statute](#), Art.67(2).

⁸⁰ *See infra* paras.30-34.

⁸¹ [Resolution 67/19](#), para.5.

C and Jerusalem.⁸² Any acts allegedly committed in those territories thus cannot serve to justify a finding of jurisdiction.⁸³

C. The Request fails to establish jurisdiction because it does not show the PA has attained statehood under international law.

1. There are objective standards for the establishment of new states

40. Two weeks before filing the Request, the Prosecutor acknowledged in a different context that under international law, “State territory refers to geographic areas under the sovereign power of a State – i.e., the areas over which a State exercises exclusive and complete authority.”⁸⁴ As set forth elsewhere, this excludes Area C and Jerusalem from PA territory.⁸⁵

41. As the ICTY *Milošević* Chamber held, the Montevideo criteria reflect “well-established core principles for the determination of statehood,” adding “the formation of states is a matter that is regulated by law...[t]hat law, in the Trial Chamber’s view, is reflected in the four criteria set out in the Montevideo Convention.”⁸⁶ Those criteria read:

The State as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with other States.⁸⁷

42. Notably, Montevideo was intended to set forth criteria for *establishing* states, not the continuation thereof.⁸⁸ Consequently, analogies about states which have satisfied Montevideo and subsequently lose control of their territory, cease to have a stable government, or lose the capacity to enter into relations with other States, are irrelevant.

⁸² See *infra* paras.30-34.

⁸³ See [Request](#), para.95.

⁸⁴ [2019 PE Report](#), para.48.

⁸⁵ See *infra* paras.38-39.

⁸⁶ [Milošević Decision](#), paras.86-87.

⁸⁷ [Milošević Decision](#), para.85; [Montevideo Convention](#), Art. 1.

⁸⁸ E.g. [Horbach \(2007\)](#), p.166.

43. In this instance, the Security Council did not act on a PA request for UN membership, in part because of members' concerns that the PA did not satisfy the Montevideo criteria.⁸⁹ The Request provides no reason to conclude the PA does satisfy Montevideo, arguing instead that the criteria should be applied differently in this instance.⁹⁰

2. Palestinian statehood has not been established through UNGA Resolution 67/19, accession to the Rome Statute, or recognitions by individual states

44. While ICTY and other sources have recognised an objective test for statehood,⁹¹ in its *Georgia* decision a different Pre-Trial Chamber held "South Ossetia is to be considered a part of Georgia, as it is generally not considered an independent State and is not a Member State of the United Nations."⁹² Judge Kovács dissented, suggesting a case-by-case assessment rather than a purely recognition-based approach to assertions of statehood.⁹³ If this Chamber conducts such an assessment, it could evaluate whether universal or near-universal recognition of a state, combined with *opinio juris*, would support the conclusion that a state had been established under customary international law.⁹⁴

45. In any event, that is not the case here. The Prosecutor does not claim universal or near-universal state practice in the recognition of Palestine, nor could she support such a claim. Instead, she relies on the PA's admission as a non-member observer state at the United Nations General Assembly;⁹⁵ the PA's accession to the Rome Statute;⁹⁶ and recognitions of Palestinian statehood by various states.⁹⁷ Each argument must fail.

⁸⁹ [UNSC Membership Committee Report on Palestine \(2011\)](#), para.12: "... it was stated that Hamas was in control of 40 per cent of the population of Palestine; therefore the Palestinian Authority could not be considered to have effective government control over the claimed territory."

⁹⁰ Indeed, one amicus application concedes Palestine's "non-adherence to the traditional criteria defining statehood per the [Montevideo Convention], as it does not effectively exercise powers of governance upon any territory it has laid claim to." [MyAqsa Request](#), para.14.

⁹¹ See *infra* paras.40-42.

⁹² [Georgia Decision](#), para.6.

⁹³ [Judge Kovács Separate Opinion](#), para.66.

⁹⁴ Almost every country in the world "recognize[s] South Ossetia as part of Georgia," rather than as an independent state. *E.g.* [ICG South Ossetia](#). Consequently, the *Georgia* Pre-Trial Chamber did not have to determine how "general" recognition of a new state's international legal personality would have to be in order to support a finding of statehood. Similarly, in the *Louizidou* case, the ECtHR considered a situation where there were no meaningful recognitions of the TRNC. It did not need to assess whether recognition was near-universal because recognition was nearly universally absent. [Louizidou](#), paras.42-45.

⁹⁵ [Request](#), *passim*.

⁹⁶ [Request](#), para.103 *et seq.*

⁹⁷ [Request](#), para.138.

A. The admission of Palestine as a non-member observer state at the United Nations General Assembly does not establish it is a state under international law

46. The General Assembly lacks the authority to make international law. Moreover, the voting history of Resolution 67/19 and subsequent developments reflect that it does not represent an unequivocal indication of the view of the states which voted for it, let alone of the international community.⁹⁸ Consequently, this Resolution does not overturn the international consensus that final status issues should be resolved through negotiations,⁹⁹ displace the agreement between the parties to the same effect,¹⁰⁰ or bind Israel, which opposed the Resolution and does not recognise a Palestinian state.¹⁰¹
47. The UNGA resolution relied upon by the Prosecutor “reaffirm[s] its commitment” to a two-state solution and expresses determination to “fulfil the vision of two States”.¹⁰² This resolution supported the eventual goal of Palestinian statehood by providing it a highly unusual status in the United Nations not contemplated by the Charter.¹⁰³ However, it does not recognise the existence of a state.¹⁰⁴
48. Moreover, it was clearly understood not to immediately establish a Palestinian state:
- The Secretary-General noted the resolution “does not apply to organisations and bodies outside of the United Nations”;¹⁰⁵
 - Several states voted for the resolution while noting during the debate that their votes did not entail recognition of Palestinian statehood;¹⁰⁶

⁹⁸ These observations cite General Assembly resolutions in a variety of contexts. Those resolutions should be interpreted under the same standards.

⁹⁹ See paras.62-64.

¹⁰⁰ See para.32.

¹⁰¹ [Resolution 67/19, floor remarks](#) (Mr. Prosor of Israel: “This draft resolution will not confer statehood on the Palestinian Authority, which clearly fails to meet the criteria for statehood. This draft resolution will not enable the Palestinian Authority to join international treaties, organi[s]ations or conferences as a State. This draft resolution cannot serve as acceptable terms of reference for peace negotiations with Israel...”); [Resolution 67/19 Press Release](#). See generally [Schwebel \(1979\)](#).

¹⁰² [Resolution 67/19](#), preamble and para.4.

¹⁰³ See [Vidmar \(2013\)](#), paras.15-26. The only other non-member observer state is the Holy See. *E.g.* [CRS Report](#), pp.1,8. The Holy See is a non-member observer state “by its own choice... due primarily to the desire of the Holy See to maintain absolute neutrality in specific political problems.” [Holy See Mission Site](#).

¹⁰⁴ [Ronen \(2013\)](#), p.244.

¹⁰⁵ [2013 SG Report](#), para.1.

¹⁰⁶ See generally [UN GAOR 67/44](#); [UN GAOR 67/45](#). Ronen argues that “Fifty-four states took the floor to explain their votes. Only a dozen of those seemed to consider the resolution as recognising or establishing the existence of a Palestinian State for all purposes.” [Ronen \(2013\)](#), p.239. France, for example, voted for Resolution 67/19 but did not

- The resolution did not admit Palestine as a UN member;¹⁰⁷ and
- Palestine was not given full rights of participation in the United Nations.¹⁰⁸

49. The resolution would have had no authority to establish an independent state because General Assembly resolutions are not binding international law.¹⁰⁹ International courts have identified a test for determining when General Assembly resolutions, though not directly constituting international law, may provide indicia of customary international law. In the *Nuclear Weapons* case, the ICJ stated:

General Assembly resolutions, even if they are not binding, may sometimes have normative value. They can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*. To establish whether this is true of a General Assembly resolution, it is necessary to look at its content and the conditions of its adoption; it is also necessary to see whether an *opinio juris* exists as to its normative character.¹¹⁰

The Court considered the adoption of Resolution 1653, expressly proclaiming the illegality of the use of nuclear weapons,¹¹¹ and “the adoption each year by the General Assembly, by a large majority, of resolutions recalling the content of Resolution 1653 (XVI), and requesting the Member States to conclude a convention prohibiting the use of nuclear

recognise a Palestinian state either before or after the vote. *E.g.* [Al-Kassim](#) (2020) (“Palestinian Authority President Mahmoud Abbas welcomed French President Emmanuel Macron in Ramallah, the West Bank, late Wednesday evening and expressed hope that France would recogni[s]e the State of Palestine.”).

¹⁰⁷ It would be unlawful to do so without the approval of the Security Council. *E.g.* [ICJ AO State Admission](#). See [UN 1950 Yearbook](#); [UNGA Rules](#), paras.136-137.

¹⁰⁸ *E.g.* [CRS Report](#), p.10 (noting Palestine does not have the right to vote, call for a vote, or put forward candidates in the General Assembly, except on specific issues where UN agencies’ statutes provide non-members with the right to vote).

¹⁰⁹ A proposal by the Philippines to give the General Assembly legislative authority was rejected by a 26-1 vote during the drafting of the Charter. [Falk \(1966\)](#). See also [Peterson \(2009\)](#), p. 103; Romstock 1977 (“This Assembly is not a lawmaking body. Its resolutions, in the ordinary course, do not enact, formulate or alter international law, progressively or regressively. In the exceptional cases in which a General Assembly resolution may contribute to the development of international law, it can do so only if the resolution gains virtually universal support, if the Members of the General Assembly share a lawmaking or law-declaring intent, and if the content of that resolution is reflected in general state practice”).

¹¹⁰ [Nuclear Weapons Case](#), para.70. See [Petren Fisheries Dissent](#), p.162; Crawford (2006), p.114; [Arrest Warrant Case](#), joint separate opinion of JJ. Higgins, Kooijmans and Buergenthal, para.19 (relying on the test laid out in the Nuclear Weapons Case for the relevance of GA resolutions).

¹¹¹ [Nuclear Weapons Case](#), para.72. See [Resolution 1653](#).

weapons in any circumstance” and concluded the resolutions had still not established a rule of international law.¹¹²

50. The considerations laid out in the *Nuclear Weapons* case are not satisfied here. The content of Resolution 67/19 contains no clear determination of statehood as a legal issue and reinforces the eventual goal of a two-state solution rather than declaring an immediate reality. The Secretary-General’s statement that Resolution 67/19 was confined in its effect to the United Nations, support for the resolution by states which did not recognize a Palestinian state and explicitly stated on the record that the resolution did not establish one, and unique treatment of the Palestinian Authority as a non-member observer state as opposed to a full United Nations member, among others, show there was neither broader lawmaking intent nor *opinio juris* as to the normative character of the resolution. Indeed, there has not been significant movement to recognize a Palestinian state after the resolution: approximately sixty United Nations members did not recognise a Palestinian state at the time the resolution passed; only a small number have recognised it since, and a majority of permanent members of the Security Council still do not recognise a Palestinian state.¹¹³
51. The Request concedes that General Assembly resolutions admitting an entity as a United Nations non-member observer state are “not typically regarded as implying collective recognition of statehood.”¹¹⁴ In the context of this clear precedent, the Request’s reliance on a leaked internal memorandum from the Office of Legal Affairs¹¹⁵ – which also has no lawmaking authority – is neither persuasive nor determinative.

B. Palestine’s accession to the Rome Statute does not establish it is a state under international law

¹¹² [Nuclear Weapons Case](#), para.73.

¹¹³ See [PA UN Mission](#). Indeed, leaders of both permanent Security Council members which do formally recognise Palestinian statehood have spoken of the need to achieve a Palestinian state in aspirational, rather than current, terms even after the passage of Resolution 67/19. [Independent \(2015\)](#); [Xinhua](#) (“China firmly supports the Middle East peace process and the establishment of an independent State of Palestine, which enjoys full sovereignty...”).

¹¹⁴ [Request](#), para.124 (citations omitted).

¹¹⁵ [Request](#), para.109, fn.361.

52. Similarly, the Request's reliance on the Secretary-General's acceptance of Palestine's accession to the Rome Statute¹¹⁶ must fail. The Secretary-General issued a note to correspondents several days later which described his review of the accession documents:

In conformity with the relevant international rules and his practice as a depositary, the Secretary-General has ascertained that the instruments received were in due and proper form before accepting them for deposit...

This is an administrative function performed by the Secretariat as part of the Secretary-General's responsibilities as depositary for these treaties.

It is important to emphasize that it is for States to make their own determination with respect to any legal issues raised by instruments circulated by the Secretary-General.¹¹⁷

Notably, where other UN sources refer to the Palestinian UN Mission by its self-selected name, "State of Palestine",¹¹⁸ the clarifying note did not use the word "state" and avoided any text which could be misunderstood to indicate the Secretary-General's view on statehood.¹¹⁹

53. The Request asserts "the Secretary-General has not brought any disagreement regarding the performance of his functions with respect to this issue to the Court's attention or that of States Parties."¹²⁰ In light of this document, to do so would be redundant. The Secretary-General has clarified that his performance of his functions with respect to this issue was purely administrative, days after accepting the instrument of accession, to the entire world. No further disagreement was necessary.

¹¹⁶ *E.g.* [Request](#), para.41.

¹¹⁷ [SG Accession Clarification](#).

¹¹⁸ *E.g.* [SG 2020](#); [SG February 2020](#); [SG January 2020](#). The Secretary-General noted in 2013 that "State of Palestine" is used as the official name for Palestine and its representatives in the context of the United Nations at their request. [2013 SG Report](#), paras.2-3.

¹¹⁹ [SG Accession Clarification](#).

¹²⁰ [Request](#), para.132.

C. Recognition by specific states does not establish Palestine is a state under international law

54. Finally, recognition of Palestinian statehood by individual states cannot confirm statehood. The Prosecutor previously concluded that recognition by a similar number of states did not confer statehood.¹²¹ As the Request concedes, the leading scholar on the international law of statehood has concluded in the case of Palestine specifically that “[t]here is no rule that majority recognition (outside the framework of admission to the United Nations) is binding on third states” in the absence of “quasi-unanimous support that would be required to establish a particular rule of international law to the effect that Palestine is a state.”¹²²

3. Discussion of Palestinian statehood reflects it has not yet been achieved

55. Statements by senior UN officials reflect Palestinian statehood has not yet been achieved. While neither these statements nor allegations against either Palestinians or Israelis contained therein are legally binding, they reflect the lack of an international consensus supporting statehood. For instance:

- In November 2019 Secretary-General Antonio Guterres issued a statement alleging *inter alia* that certain Israeli actions “threaten to undermine the viability of establishing a Palestinian state” (emphasis added);¹²³
- In November 2019 UN Special Coordinator for the Middle East Peace Process Nikolay Mladenov referred to “the political goal of helping Palestinians to develop freely, without relentless occupation¹²⁴, and Israelis to live in security, free from

¹²¹ [2012 OTP Palestine Decision](#), para.7.

¹²² See Crawford (2006), p. 438. Confusingly, the Prosecution suggests Crawford’s position that Palestine is not a state as a legal matter has changed because of later text saying Palestine is “eking its way towards statehood.” Aside from the fact that moving “towards” something indicates it has not yet been reached, this text is taken from a section of a book dealing with the international legal personality of non-state entities such as Somaliland and Taiwan. [Request](#), para.143.

¹²³ [SG November 2019](#).

¹²⁴ Many international sources treat “occupation” as simply meaning the occupying power *is not* a recognised sovereign, regardless of whether a territory has a recognised sovereign *other than* the occupying power. The distinction applies only where sovereignty over the territory is disputed. See [2016 ICRC Commentary](#), paras.324-327. The international use of the term “occupied” to describe Palestinian-claimed territory thus does not imply Palestinian sovereignty. Israel’s position is that its authority in the West Bank is not an occupation because only territory previously controlled by a sovereign state can be “occupied” under the Hague Regulations, but it nonetheless applies the humanitarian provisions of the law of occupation. *E.g.* Shamgar (1971), pp.262-66.

the fear of terror and rockets. The only way to ensure this goal is to work towards – and achieve – a two-state solution, based on relevant UN resolutions; a two-state solution, in which Gaza is an integral part of the future state of Palestine” (emphasis added);¹²⁵

- In April 2019 Mladenov spoke of the United Nations’ commitment to advancing Palestinians’ “legitimate national aspirations for statehood” (emphasis added);¹²⁶
- in February 2019 Secretary-General Guterres spoke of a “future Palestinian state” (emphasis added);¹²⁷
- in October 2018 Mladenov asserted that planned construction in parts of Area C where Israelis live would “undermin[e] the contiguity of a future Palestinian state” (emphasis added);¹²⁸
- in November 2016 Mladenov asserted that due to recent events, “the possibility of a future Palestinian state comes under threat like never before”;¹²⁹
- on 1 July 2016 Secretary-General Guterres spoke against “entrenching a one-state reality” and of the need to “create[] a sovereign Palestinian state”;¹³⁰
- on 30 June 2016 Special Coordinator Mladenov said, “Palestinian frustration cannot be wished away... neither will the violence and terror, fueled by resentment, bring about a Palestinian state”;¹³¹
- a press briefing by the Secretary-General’s office in October 2015 referred to “the goal of a Palestinian state” and Palestinian “aspirations” for statehood;¹³² and
- a note to correspondents from the Quartet in September 2015 referred to “Palestinian aspirations for statehood and sovereignty”.¹³³

¹²⁵ [Mladenov November 2019](#).

¹²⁶ [Mladenov April 2019](#).

¹²⁷ [SG February 2019](#).

¹²⁸ [Mladenov October 2018](#).

¹²⁹ [UNSC PR 2016](#).

¹³⁰ [SG July 2016](#).

¹³¹ [Mladenov June 2016](#).

¹³² [2015 SG’s Briefing](#).

¹³³ [Quartet 2015 Note](#). At the time, the Quartet was comprised of Secretary-General Ban Ki Moon, United States Secretary of State John Kerry, Russian Foreign Minister Sergei Lavrov, and European High Representative for Common Foreign and Security Policy Federica Mogherini. *Id.*

These statements were all made after Palestine's deposit of instruments of accession to the Rome Statute, further reflecting the inadequacy of the Request's reliance on the Secretary-General's "purely administrative" response to those instruments.¹³⁴

56. Even the statements cited by the Prosecutor include recent statements which call for "allowing the realisation" of a Palestinian state,¹³⁵ for the "establishment" of a Palestinian state,¹³⁶ and for a "future State of Palestine"¹³⁷ express concern about "stalled progress toward statehood,"¹³⁸ and refer to "continuing efforts to attain statehood".¹³⁹ One EU document¹⁴⁰ dated 2014 which is relied upon by the Prosecutor in the context of determining the borders of an alleged Palestinian state reads, in an uncited portion:

The EU's continued support to Palestinian state-building requires a credible prospect for the establishment of a viable Palestinian state, based on respect of the rule of law and human rights.¹⁴¹

57. Similarly, even after the PA submitted its instruments of accession to the Rome Statute, Palestinian leaders have often referred to a Palestinian state as something to be achieved in the future. For instance:

- Abbas stated in 2017 "[i]n due time there will be a Palestinian state but it will not happen soon";¹⁴²
- The first prong of Palestine's 2017-22 "National Policy Agenda" is titled "Achieving Our Independence";¹⁴³ and

¹³⁴ See *infra* paras.52-53.

¹³⁵ [Request](#), para.201.

¹³⁶ [Request](#), paras.170,213-214.

¹³⁷ [EU Council 2014](#), para.10.

¹³⁸ [Request](#), para.145.

¹³⁹ [UNDP Palestine](#), p.5.

¹⁴⁰ The EU does not recognise a current Palestinian state. *E.g.* [European Joint Strategy](#), pp.7 (twice referring to the "future" state of Palestine),⁹ (referring to "preparing [Palestinian] institutions for statehood"),¹¹ (referring to "supporting Palestinian aspirations for statehood"),¹⁴ (referring to "Palestinian aspirations for statehood" and a future "viable Palestinian state"),²⁸ (referring to "the future Palestinian state"),³³ (referring to "a future Palestinian state"),⁴¹ (twice referring to "establishing a viable Palestinian state"),⁴² (referring to "a future Palestinian state"),⁴³ (referring to a "future Palestinian state"),⁴⁴ (referring to a "future Palestinian state"); [EU Council Conclusions](#), paras.6 (referring to "Palestinian aspirations for statehood"),⁹ (referring to "Palestinian aspirations for statehood"),¹⁰ (referring to a "future Palestinian state").

¹⁴¹ [EU Council Conclusions](#), para.9.

¹⁴² See [Abbas 2017 interview](#) (translated from Arabic).

¹⁴³ [Palestinian Agenda](#), p.5. See Crawford (2006), p.62 ("Statehood is the central criterion for statehood"), cited in [Ash \(2009\)](#), p.197.

- Dr. Saeb Erekat, a long-serving Palestinian diplomat and chief negotiator, in 2019 decried purported efforts to “prevent the establishment of a Palestinian state”, adding “This will not happen. A Palestinian state will be created...”¹⁴⁴

58. Palestinian authorities have also published position statements reflecting that a Palestinian state is a future aspiration. The “positions” section of the Palestinian Authority’s website refers to “establishing a Palestinian state” and the basic requirements for “the creation of a sovereign Palestinian state”,¹⁴⁵ and in some instances refer to “our future state” and “our state” in the same paragraph.¹⁴⁶

4. A “State for the Purpose of the Rome Statute” cannot delegate jurisdiction

59. The Prosecutor asserts at times in the Request that Palestine is a state *for the purpose of* Article 12, or of the Rome Statute generally.¹⁴⁷ However, territory of a state is territory over which that state is sovereign, as she noted recently.¹⁴⁸ The Rome Statute’s reference to the “territory of a state” in Article 12 should be read in light of this ordinary meaning.¹⁴⁹

60. Consequently, regardless of whether an entity which is put forward as a state only for the purpose of the Rome Statute may reasonably be considered to have the right to participate in various activities of the Court, it cannot serve as a source of jurisdiction for the Court unless it is also the sort of ‘state’ which has borders and jurisdiction over defined territory.¹⁵⁰

61. This interpretation is strengthened by the fact that the drafters of the Rome Statute were aware that the first contemporary international criminal tribunal, ICTY, when seeking to broaden the definition of ‘states’, had done so explicitly in its rules.¹⁵¹ This definition has

¹⁴⁴ [Erekat J Street Speech](#) (11:30-11:48).

¹⁴⁵ [Palestinian Security](#) (noting as well that “The main aim, after all, is to establish a national homeland for the Palestinians...”).

¹⁴⁶ [Palestinian Claims](#).

¹⁴⁷ *E.g.* [Request](#), Sections II.B.1, II.B.2.

¹⁴⁸ [2019 PE Report](#), para.48..

¹⁴⁹ [VCLT](#), Art.31 (“a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context...”).

¹⁵⁰ The Prosecutor does not rely in the Request on the Court’s jurisdiction over nationals of a state party, so the implications of statehood on nationality are not addressed here. [Request](#), fn.55.

¹⁵¹ [ICTY Rules \(1995\)](#), Rule 2 (first incorporating into its definition of ‘state’ “a self-proclaimed entity *de facto* exercising government functions, whether recognised as a state or not”); [ICTY Rules \(2009\)](#), Rule 2 (further amending the definition of ‘State’ but continuing to include non-UN members, *de facto* entities, and governing entities within Bosnia and Herzegovina).

been continued in the Rules of the IRMCT, ICTY's successor institution,¹⁵² but the ICC has not adopted a similarly expansive definition.

D. The Court should decline to take jurisdiction because to do so would require it to resolve ongoing and contentious legal, diplomatic and political questions as to which it is an inappropriate forum.

1. The international community has stated clearly that final status matters should be resolved through bilateral negotiations.

62. The international community has repeatedly expressed support for the position agreed to by Israel and the PA in the Oslo Accords:¹⁵³ boundaries and other final status matters are to be resolved by negotiated agreements between the parties. The Secretary-General¹⁵⁴, Special Coordinator¹⁵⁵ and Security Council¹⁵⁶ have all made this point since the Request was filed. This consensus was part of the 2011 Security Council debate which did not confirm the PA's application for membership¹⁵⁷ and is incorporated in Resolution 67/19:

5. Expresses the urgent need for the resumption and acceleration of negotiations within the Middle East peace process based on the relevant United Nations resolutions, the terms of reference of the Madrid Conference, including the principle of land for peace, the Arab Peace Initiative and the Quartet road map to a permanent two-State solution to the Israeli-Palestinian conflict for the achievement of a just, lasting and comprehensive peace settlement between the Palestinian and Israeli sides that resolves all outstanding core issues, namely the Palestine refugees, Jerusalem, settlements, borders, security and water;¹⁵⁸

The pre-1967 borders on which the Prosecutor relies were also drawn between two United Nations members, Israel and Jordan, "without prejudice to future territorial settlements or

¹⁵² [IRMCT Rules](#), Rule 2(a).

¹⁵³ See para.32.

¹⁵⁴ [SG 2020](#).

¹⁵⁵ [Mladenov Feb 2020](#).

¹⁵⁶ [SC 2020 Statement](#).

¹⁵⁷ [UNSC Membership Committee Report on Palestine \(2011\)](#), para.6 ("The view was expressed that a two-State solution via a negotiated settlement remained the only option for a long-term sustainable peace and that final status issues had to be resolved through negotiations").

¹⁵⁸ [Resolution 67/19](#), para.5 (footnotes and citations omitted).

boundary lines” and not “intended as prejudicing, in any sense, an ultimate political settlement between the parties...”¹⁵⁹

63. These various sources reflect the true international consensus: final control of territory which is claimed by both parties should be resolved by negotiations within a land for peace framework. This Chamber should not adjudicate disputed territory so as to replace this internationally accepted framework with a new system judicially transferring land without establishing peace or allowing a party’s accession to Rome to abrogate its obligations under Oslo.
64. In its Advisory Opinion, the ICJ similarly recognised that a judicial determination of the borders between Israel and a future Palestinian state would be inappropriate. In the *Advisory Opinion* case that Court “wisely and correctly...avoids ‘permanent status’ issues”, instead drawing attention to the need for achieving “a negotiated solution to the outstanding problems and the establishment of a Palestinian State”.¹⁶⁰

2. If a court were to attempt to adjudicate the borders of Israel and a future Palestinian state Israel would be an indispensable party.

65. The ICJ’s caution is consistent with the general rule of international law that courts should not decide issues that significantly impact the legal interests of a non-participating state.¹⁶¹ The Prosecutor’s attempt to distinguish this case is insufficient.
66. First, the Prosecution asks the Chamber to disregard the PA’s inability to satisfy the *Montevideo* criteria in part on the basis of purportedly unlawful Israeli conduct.¹⁶² This underscores the challenges in litigating responsibility for the stalling of the peace process. For instance, the Prosecutor does not explain how the Palestinian withdrawal from final status negotiations at Camp David in 2000¹⁶³ and subsequent Second Intifada, in which hundreds of Israelis were killed by suicide bombers,¹⁶⁴ relates to her attempt to ascribe to

¹⁵⁹ [Armistice](#), Art.II(2), Art.VI(9).

¹⁶⁰ [Advisory Opinion](#), para.162; [Separate Opinion of Judge Higgins](#), pp.201,211; [Separate Opinion of Judge Owada](#), p.267. See [Newton \(2016\)](#), p.411 (noting that the ICJ “avoided resolution of permanent status issues such as borders”).

¹⁶¹ [Monetary Gold](#).

¹⁶² [Request](#), e.g. paras.137-138.

¹⁶³ See [Pressman \(2003\)](#); [Friedman \(2001\)](#); [CRS Negotiations Report](#).

¹⁶⁴ See [BBC](#) (documenting the deaths of more than 50 killed and more than 250 injured as a result of three Palestinian suicide attacks in 2001; more than 60 of such deaths in 2002; nearly 80 in 2003; and nearly 40 in 2004).

Israel sole responsibility for the lack of a final status agreement further realizing Palestinian self-determination¹⁶⁵ and does not consider whether the PA has fulfilled its obligations in the Oslo, Wye or Hebron agreements.¹⁶⁶

67. To the extent that these purportedly unlawful acts implicate *individual* criminal responsibility, addressing this argument would also require the Chamber to prejudge issues which would arise in any trial, which is facially inconsistent with the rule of law. Addressing these issues is different from considering allegations of crimes in the standard context of confirming a decision to investigate. In that context, a Chamber is merely asked to assess the Prosecutor's determination that there is a reasonable basis to believe crimes within the jurisdiction of the court had been committed.¹⁶⁷ By contrast, here, the Chamber would have to make an affirmative finding of unlawful conduct and affirmatively find that conduct justified varying the typical standards for statehood. The impropriety of doing so in the absence of any admissible evidence is heightened, not removed, by the fact that the ICC is a *criminal* court and thus obliged to guarantee the presumption of innocence.
68. The Prosecutor's second purported distinction, that this Chamber "is not asked to resolve a territorial dispute or to determine the holder of valid legal title over"¹⁶⁸ is a distinction without a difference.¹⁶⁹ This Court cannot satisfy itself it has jurisdiction without determining, *inter alia*, whether Area C, Gaza and Palestinian-claimed areas of Jerusalem are "the territory of" the PA for purposes of the ICC, and for the reasons set forth above it ought not do so.¹⁷⁰
69. Finally and most inappropriately, the Prosecution argues that Israeli "breaches of international law" may be "taken as given."¹⁷¹ Initially, *Larsen* recognises *Monetary Gold*

¹⁶⁵ The word "intifada" appears nowhere in the Prosecutor's lengthy historical discussions. The word "terrorism" appears in the text once, in a quote from Oslo II. [Request](#), para.68.

¹⁶⁶ *Compare, e.g., Wye River Memorandum*, Art.2(A)(3)(i) ("Drawing on relevant international practice and pursuant to Article XXII (1) of the Interim Agreement and the Note for the Record, the Palestinian side will issue a decree prohibiting all forms of incitement to violence or terror, and establishing mechanisms for acting systematically against all expressions or threats of violence or terror. This decree will be comparable to the existing Israeli legislation which deals with the same subject.") with [December 2019 PE report](#), para.222 (noting allegations that "the PA have encouraged and provided financial incentives for the commission of violence through their provision of payments to the families of Palestinians who were involved, in particular, in carrying out attacks against Israeli citizens, and under the circumstances, the payment of such stipends may give rise to Rome Statute crimes.")

¹⁶⁷ [Afghanistan Decision](#), para.34; [Rome Statute](#), Art.15(4); [Regulations](#), Regulation 49(1).

¹⁶⁸ [Request](#), fn.60.

¹⁶⁹ See [Request](#), paras.141,179.

¹⁷⁰ See paras.62-64.

¹⁷¹ [Request](#), fn.60.

as a rule,¹⁷² merely acknowledging the possibility that it “*may well not apply*” if the unlawfulness of a non-party’s conduct may be “taken as given (for example, by reason of an authoritative decision of the Security Council on the point)...”¹⁷³ Second, the ICJ has interpreted ‘givens’ demandingly, finding for instance that a rule may not be taken as given if generally applicable treaties did not include reservations for consistency with the rule.¹⁷⁴ Third, this language irreversibly erodes the Prosecution’s burden of proof in any eventual trial with any relationship to those alleged breaches and reflects a level of certainty inconsistent with the information available to the Prosecutor at a “preliminary examination” stage.

70. In addition, numerous Security Council and General Assembly resolutions set forth that the parties should take their next steps within the Oslo-confirmed, bilaterally negotiated “land for peace” framework.¹⁷⁵ These clearly set forth the international consensus: final status issues, including whether Israel or an eventual Palestinian state will include the territory referred to by the Prosecutor in paragraph 95 of the Request, should be resolved bilaterally between the parties and not by any external institution.¹⁷⁶ The Request asks this Chamber instead to award land without peace and allow the evasion of bilateral negotiations deemed essential by the international community for a true and lasting peace long sought by the world and the parties themselves.

E. The Court should decline jurisdiction because the PA’s referral¹⁷⁷ is flawed.

71. The Palestinian Authority’s referral is inadequate. As Bassiouni has written, “referrals under Article 12(3) were intended to be by states only.”¹⁷⁸ Moreover, the referral relates in

¹⁷² [Larsen](#), para.11.20. (“The principle of consent, which is fundamental to the jurisdiction of international tribunals, is largely irrelevant in determining the scope of jurisdiction of a national court... The principle of consent in international law would be violated if this Tribunal were to make a decision at the core of which was a determination of the legality or illegality of the conduct of a non-party.”).

¹⁷³ [Request](#), fn.60; [Larsen](#), para.11.24.

¹⁷⁴ [East Timor Judgment](#), paras.31-32.

¹⁷⁵ *E.g.* [SC Res 242](#); [SC Res 338](#); [SC Palestine](#); [Resolution 67/19](#), para.5. See Cassesse (1995), p.240.

¹⁷⁶ *E.g.* Cassesse (1995), p.247 (writing shortly after Oslo that “at long last, the path suggested by international norms, that is, a peaceful process of negotiations between the parties concerned, has been taken...”).

¹⁷⁷ Palestinian authorities accepted jurisdiction under Article 12(3) on 31 December 2014. [12\(3\) Acceptance](#). After submitting instruments of accession to the Rome Statute, they subsequently submitted a referral under Article 14 on 15 May 2018. [Referral](#). See [Scharf \(2009\)](#), pp.576-580 (addressing both 12(3) acceptances and state referrals).

¹⁷⁸ [Bassiouni 2009](#). See paras.40-58.

substantial part to conduct at a time when the case for statehood is particularly weak and should additionally be dismissed as violating the “clean hands” doctrine.”

1. The PA’s purported Rome Statute accession does not justify the temporal scope of the referral.

72. The Request relies heavily on the PA’s submission of an instrument of accession to the Rome Statute. However, accession taken at its highest can only serve as a factor in evaluating statehood at the time of accession and thereafter. Consequently, for conduct which occurred between 13 June 2014 – the start date self-servingly selected for the PA’s purported referral – and the PA’s submission of accession, accession cannot support a finding of statehood or of jurisdiction. The case for jurisdiction is thus even more clearly inadequate when it is applied to conduct before April 2015 – meaning the Court has no jurisdiction over allegations related to the 2014 Gaza conflict.¹⁷⁹

73. Indeed, a Security Council resolution which was broadly understood to call *inter alia* for the establishment of a Palestinian state failed the day before Palestinian authorities submitted instruments of accession to the Rome Statute.¹⁸⁰ This context demonstrates clearly that the Security Council had not recognised an existing Palestinian state at the relevant time.

74. As set forth above, the Prosecutor provides only a very short list of alleged conduct – mostly related to the 2014 conflict in Gaza – as to which she has determined there is a reasonable basis to proceed with an investigation.¹⁸¹ Consequently, the Court’s lack of jurisdiction before the PA submitted its Rome Statute accession significantly undermines the Request. Taken together with the Court’s lack of territorial jurisdiction over Area C or Jerusalem,¹⁸² no jurisdiction can lie regardless of the status of Palestinian statehood.

2. The PA’s referral was not made in good faith and should be dismissed.

¹⁷⁹ Indeed, the Prosecution represents some uncertainty as to whether there was an *international* armed conflict in Gaza in the summer of 2014. [Request](#), fn.341.

¹⁸⁰ *E.g.* [France 24 \(2015\)](#). See [S/2014/916](#).

¹⁸¹ [Request](#), para.94.

¹⁸² See paras.30-34.

75. It is an oft-cited principle of international adjudication that a party¹⁸³ seeking to enforce a right provided to it in a treaty must do so in good faith.¹⁸⁴ This has often been interpreted by courts and scholars in line with the clean hands doctrine, which arises out of traditional equitable principles.¹⁸⁵ The scope of the clean hands doctrine is unsettled.¹⁸⁶ However, it is most persuasive where – as here – a party’s iniquity is directly related to the right it seeks to invoke. Moreover, applying the doctrine to deny a party’s attempt to refer a matter to the ICC in a way which shields directly relevant criminal conduct from scrutiny is consistent with the spirit of the Rome Statute.
76. In this instance, the PA selected the initial date of its referral – 13 June 2014 – to coincide with the beginning of an Israeli operation to locate the terrorists responsible for murdering three Israeli teenagers the day before.¹⁸⁷ This has the effect of excluding previous notorious criminal conduct by Palestinian armed groups from the scope of the referral¹⁸⁸ and shielding from investigation those who may have ordered, solicited, aided and abetted, or otherwise contributed to the commission of the crime.¹⁸⁹
77. As the PA referral makes explicit, a referral is an attempt to exercise a right based on the Rome Statute.¹⁹⁰ Treaty rights must be invoked with clean hands. Since the PA has not done so, this court should not accept jurisdiction.
78. Applying this rule in the context of ICC investigations is consistent with the Rome Statute’s determination that “situations”, not individual cases, may be referred to the Court. As has been written, “The term ‘situation’ cannot be interpreted in a narrow or restrictive manner that singles out a given party to a given conflict, or a given group, or military unit.”¹⁹¹
79. It would not be appropriate for a Chamber to insist that it be proven a referring party or particular individuals associated with it *would* bear legal culpability for a crime in order to

¹⁸³ There is no principled reason that a non-state entity purporting to invoke its rights under a treaty to which it has filed a statement of accession should be exempted from the clean hands doctrine.

¹⁸⁴ *E.g.* [VCLT](#), Art.26.

¹⁸⁵ As one eighteenth-century commentator wrote, “He that hath committed Iniquity, shall not have Equity.” [Francis \(1727\)](#). See [Fraport II](#), para.328.

¹⁸⁶ See generally [Dugard Report](#).

¹⁸⁷ Reports indicate one perpetrator had been among 1,000 Palestinians sentenced for crimes including murder and terrorism who were exchanged in 2011 for an Israeli soldier kidnapped by Palestinian fighters. [Pileggi \(2015\)](#).

¹⁸⁸ *E.g.* [Richemond-Barak \(2020\)](#).

¹⁸⁹ See [Rome Statute](#), Art. 25(b)-(d).

¹⁹⁰ *E.g.* [Referral](#), para.6 (stating that Palestine would “hereby exercise its right as a State Party to the Rome Statute...”).

¹⁹¹ [ICC Leg History](#), p.142.

invoke the principle that a party must have clean hands to invoke its purported rights before this Court. Indeed, that would require a Pre-Trial Chamber to prejudge the results of an investigation which has not even been commenced, let alone completed. Instead, where the terms of a referral attempt to shield from investigation criminal conduct which available information indicates there is a reasonable basis to believe was committed by a person or persons associated with the referring party, this Court should reject the referral.

V. Request for Relief

80. For the foregoing reasons and in the interests of justice, The Israel Forever Foundation respectfully requests that if this Chamber grants the Request and issues a ruling on jurisdiction, it find that:

- the jurisdictional prerequisites of the Rome Statute have not been satisfied; and
- the Court is thus without jurisdiction over the events the Prosecutor seeks to investigate.

Respectfully submitted on behalf of The Israel Forever Foundation,



Arthur Traldi



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Heideman Nudelman & Kalik, PC



Joseph Tipograph

Dated this 16th day of March, 2020
At Washington, DC USA

***AMICUS BRIEF: “OBSERVATIONS ON THE PROSECUTOR’S REQUEST ON
BEHALF OF THE NON-GOVERNMENTAL ORGANISATIONS: THE LAWFARE
PROJECT, THE INSTITUTE FOR NGO RESEARCH, PALESTINIAN MEDIA
WATCH, AND THE JERUSALEM CENTER FOR PUBLIC AFFAIRS”***

***AMICUS BRIEF:* “PUBLIC WITH PUBLIC ANNEXES A B AND C:
CORRIGENDUM TO SUBMISSIONS PURSUANT TO RULE 103 (THE ISRAEL
FOREVER FOUNDATION)”**



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